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No. ____

IN THE
Supreme Court of the United States

EARL A. OWENS,
Petitioners,

v.

STATE OF ILLINOIS,
Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fourth Judicial Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents three significant constitutional questions regarding the practices of Illinois police and Illinois courts:

1. Did the Circuit Court of Macon County and the Appellate Court for the Fourth District of Illinois violate Mr. Owens's Fourth Amendment rights when it refused to suppress evidence obtained through the Decatur Police's pretextual arrest of Mr. Owens which was unsupported by probable cause?

2. Did the State of Illinois violate Mr. Owens's Fourth Amendment rights when it manufactured probable cause to validate its pretextual arrest?

3. Did the Circuit Court of Macon County and the Appellate Court for the Fourth District of Illinois violate Mr. Owens's Sixth Amendment rights when they denied his motion for a new trial on the merits without providing him counsel at this critical stage of his proceedings? Relatedly, was Mr. Owens denied the effective assistance of counsel at trial and in connection with his post-trial motions?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Earl A. Owens respectfully petitions for a writ of certiorari to review the judgment of the Illinois Appellate Court in *People v. Owens,* No. 4--04--0087 (March 13, 2007), *leave to appeal denied,* (September 26, 2007). The judgment affirmed Mr. Owens's conviction for first degree murder in the Circuit Court of County of Macon.

OPINIONS BELOW

The opinion of the Illinois Appellate Court is unreported, but is reprinted at Appendix C. The Illinois Appellate Court's order denying rehearing is unpublished but is reprinted at Appendix D. The Illinois Supreme Court's order denying leave to appeal is unreported, but is reprinted at Appendix E. The Circuit Court of Cook County sentence and judgment of conviction are not reported, but are reprinted at Appendix A. A transcript of proceedings of the hearing during which Mr. Owens's *pro se* post-trial motion was denied is reprinted at Appendix B.

STATEMENT OF JURISDICTION

This petition is filed within 90 days of September 26, 2007, the date on which the Illinois Supreme Court denied Mr. Owens's petition for leave to appeal the appellate court's judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue,

> but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(U.S. Const. amend IV).

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(U.S. Const. amend VI).

STATEMENT OF THE CASE

This case is about upholding the Constitutional rights of persons under investigation for, and those convicted of, serious crimes in Illinois. The State of Illinois violated Earl Owens's constitutional rights in different ways, at very different stages of this case. First, before he was ever charged with the murder of which he was convicted and before the police had anything like probable cause to suspect him of that murder, he was arrested for another crime, vehicle theft, in order to allow the police to interrogate him for the murder. This violated Mr. Owens's right against unreasonable search and seizure for two reasons. First, the police had no probable cause to arrest Mr. Owens for the vehicle theft because both officers who spoke to the complaining witness testified that she stated that Mr. Owens had permission to drive the car. Second, even if the police did have probable cause for the initial arrest, that probable cause vanished when the complaining witness, again, spoke with officers while Mr. Owens was being detained and questioned and reiterated that he had permission to use her car. At that point, Mr. Owens should have been released. Instead, police persisted in their questioning and eventually elicited Mr. Owens's consent to search his home. That search revealed key evidence that was used to convict Mr. Owens. This Court should grant *certiorari* to clarify that, with respect to such a transparently pretextual arrest, the critical question of probable cause must be analyzed at all stages of the arrest and questioning; and to do otherwise is unconstitutional.

From this unconstitutional arrest before Mr. Owens was even charged with the crime, we turn forward to the procedure the trial court followed after Mr. Owens was convicted, when he filed a *pro se* motion for a new trial alleging ineffective assistance by trial counsel. The trial court refused to appoint counsel to assist Mr. Owens with the preparation and presentation of this motion, instead requiring Mr. Owens to defend the motion in open court and denying the motion in its entirety, even though many of the claims relied on matters outside of the record. This was erroneous, and this Court should grant *certiorari* in order to clarify that it is a Sixth Amendment violation to deny claims raised in a post-trial motion, which rely on matters outside the record, without appointing counsel. Moreover, the claims Mr. Owens was attempting to raise related to ineffective assistance of trial counsel. He must at some point be allowed to raise such claims with the assistance of counsel, whether it be in a post-trial motion or in post-conviction proceedings, but the procedure followed by the Illinois courts in this case could have the effect of precluding either. Mr. Owens brought this problem to the attention of the Illinois appellate courts, but they have not even acknowledged that the problem exists.

On June 12, 2000, Decatur police discovered the body of Mary Ann Wright in her home. That same day, the police began canvassing Ms. Wright's neighborhood as part of their investigation of the crime. (Supp. Rec. V. I, p. 5.)[1] The police attempted to question Mr. Owens, Ms. Wright's neighbor, as a possible witness, but were unable to locate him. (Supp. Rec. V. I, p. 6, 53; Supp. Rec. V. 32, pp. 17-19.)

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[1] Record cites are in the following format: (A. __) for materials in the Appendix to this Petition for Writ of Certiorari; (C__) for

The police did, however, speak with Michele Buckner. Ms. Buckner, Mr. Owens's common-law wife, reported her car as missing to a police officer who was canvassing the neighborhood. However, Ms. Buckner informed the officer that Mr. Owens had permission to use the vehicle. (*Id.*, Rec. V. 10, pp. 29-32, 35, 108.) Decatur Police Detective Hubbard, the officer who first spoke to Buckner, testified that he "tried to talk her out of making a report," explaining that he "was trying to get out of it and get on to more important things" (Supp. Rec. Vol. 1, pp. 13-14)—he "wanted to get them out of the way, so I could go about the business of who killed Mrs. Wright." (Supp. Rec. V. 1, p. 20.) Detective Hubbard acknowledged that Ms. Buckner told him that the last time she had seen Mr. Owens in the car, she had given him the car, had given him the keys, and "had given him permission to drive the car." (Supp. Rec. V. 1, pp. 20-21.) Decatur Police Officer Claypool, who took Ms. Buckner's report, also confirmed that Ms. Buckner stated that Mr. Owens had permission to drive the car. (Rec. V. 10, p 108.)

The police also spoke that morning with Jo and Glenn Wilson, who lived two houses from the victim. The Wilsons reported to the police that between 7:15 and 7:30 that morning, they saw a

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the common law record; (Rec. __) for the unattached Report of Proceedings; and (Supp. Rec. __) for the unattached supplemental volumes.

black male carrying a pair of boots walk by their house. (Rec. V. 40, pp. 89-90.) The Wilsons knew Mr. Owens, who is an African-American man, and told officers that the man they saw that morning was not Mr. Owens. (*Id.*)

Despite the Wilsons' statements that Mr. Owens was not the man they saw, on the next day, June 13, 2000, Decatur Police Detectives Beck and Chabak were instructed to investigate Mr. Owens's possible involvement in Ms. Wright's death. (Supp. Rec. V. 1, pp. 135-36; Rec. V. 32, p. 18.) The Decatur Police proceed to Mr. Owens's residence and placed him under arrest—not for the murder, however, but for the theft of Ms. Buckner's car. (C25.) Decatur police had no warrant for Mr. Owens's arrest at the time they took him into custody and, as noted above, they knew he had permission to use Ms. Buckner's car. (Rec. V. 10, pp. 29-32, 35, 108; C185-86.)

After Mr. Owens was taken into police custody he signed a Waiver of Rights, indicating that if he chose to talk to police about the auto theft, what he said could be used against him. (Mot. Supp. Def. Ex. 12A.) Detective Beck gave Mr. Owens his Miranda warnings and proceeded to interrogate him. The opening questions in the interrogation involved the alleged auto theft. However, Detective Beck denied Mr. Owens's request to call Buckner to confirm that he had permission to use the car. (Rec. V. 11, p. 152.) The interrogation turned to the Wright murder, with Detective Beck inquiring into Mr. Owens's whereabouts at the time of the murder and his relationship with Ms. Wright. (Supp. Rec. V. 1, p.

147, 154; Rep. T. V. 11, pp. 131-2, 156.) (Supp. Rec. V. 1, pp. 138-40; Rec. 32, p. 18.)

While Mr. Owens was being interrogated, police spoke again with Ms. Buckner. Ms. Buckner reiterated to police, at that time, that Mr. Owens had permission to use her vehicle. (Rec. V. 10, pp. 44-47; Rec. V. 32, p. 19-20.) Despite these statements exonerating Mr. Owens for the car theft for which he was arrested, Detective Beck continued to question Mr. Owens regarding both the car theft and eventually the murder.

Mr. Owens was interrogated for approximately 90 minutes. (Rec. V. 11, p. 143-44) Detective Beck ultimately convinced defendant to authorize a search of his home, a search which Detective Beck admitted related only to the murder investigation. (Supp. Rec. V. 1, pp. 153-54, 175-76.) The Decatur Police conducted a search of Mr. Owens's home, and found and confiscated a pair of black work boots smeared with a substance they believed might be blood. (Mot. Supp. People's Ex. 3; Rec. V. 11, pp. 160-61.) The police halted the search, however, when the State's Attorney advised them to stop and suggested they obtain a search warrant. (Supp. Rec. V. I, pp. 159-161.) The police obtained a warrant thereafter based on laboratory tests which confirmed the presence of possibly human blood on the boots. (Supp. Rec. V. I, pp. 168-69). During a second search of defendant's home the police reportedly recovered a pair of black shoes smeared with an unknown substance that they also suspected was blood. (Supp. Rec. V. 1, pp. 167-8.)

The jury found Mr. Owens guilty of first degree murder (Rec. V. 41, pp. 56-58.).

Following the verdict, Mr. Owens filed a timely motion for a new trial through counsel. C499-501. Mr. Owens filed an additional *pro se* motion for a new trial alleging ineffective assistance of counsel. A. 97a-108a. The court heard and denied these motions on January 15, 2004 (A. 5a-26a), the same date as the sentencing hearing.

Although Mr. Owens's motion concerned counsel's performance at trial, many of his claims relied in whole or in part on matters outside the trial court record. Mr. Owens appended a lengthy set of exhibits to his motion to help demonstrate the substantial questions raised by his claims. (For the Court's convenience, Mr. Owens's motion is reproduced in the Appendix to this Petition. *See* A. 97a-108a)

Because of the number and complexity of the claims raised, Mr. Owens requested the assistance of counsel in preparing and presenting his motion to the court. (A. 98a) The trial court denied Mr. Owens such assistance. Instead, the trial court cross-examined Mr. Owens regarding his claims, requiring that in open court, in front of trial counsel, Mr. Owens argue his motion alleging ineffective assistance of trial counsel. (A. 7a-20a)[2] Then, after the trial judge admitted that he had only "looked at *some* of these exhibits [to the motion]," the trial court stated that Mr. Owens's post-trial motion "does not meet the threshold of even appointing new counsel." (A. 20a) The court proceeded to deny Mr. Owens's post-trial motion on the merits in its entirety, making no distinction between those claims which relied on matters outside the record and those which did not. (A. 22a)

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[2] Mr. Owens's *pro se* petition was the first matter addressed at the January 15 hearing—meaning that the trial court required Mr. Owens to personally attack the competence of defense counsel immediately before defense counsel presented and argued Mr. Owens's post-trial motion (which was denied), and

Mr. Owens objected on appeal to the trial court's disposition of his post-trial motion. Mr. Owens argued that the trial court had erred both in failing to appoint counsel and in failing to differentiate between those claims based solely on the record and those raised outside the record. *See* (A. 79a (court erred in failing to appoint counsel)), (A. 72a (court should have differentiated between claims based solely on record and those which relied on materials outside the record). Mr. Owens observed that not only was he entitled to the assistance of counsel, but moreover that the denial of his motion in its entirety on the merits could work a substantial injustice. Specifically, because the claims were denied on their merits, there was a chance he could be held to be barred from raising those claims in post-conviction, despite the fact that he never had the assistance of counsel in developing those claims and despite the fact that he was denied the opportunity to explore and develop those claims which depended on materials outside the record.

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also before Mr. Owens's sentencing hearing (at which he received the maximum allowable sentence).

Based on binding precedent from the Illinois Supreme Court (*People v. Moore*, 797 N.E.2d 631 (Ill. 2003)), the Appellate Court held that it was proper to deny Mr. Owens the assistance of counsel on his post-trial motion so long as the trial court "'conducted an adequate inquiry into the defendant's pro se allegations of ineffective assistance of counsel.'" (A. 49a-50a), quoting *Moore*, 797 N.E.2d at 638. The appellate court did not address Mr. Owens's claim regarding the trial court's error in failing to distinguish between claims which did and did not rely on matters outside the record. The appellate court denied Mr. Owens's petition for rehearing without comment. (A. 53a.)

Mr. Owens raised these same issues again in his Petition for Leave to Appeal to the Illinois Supreme Court. *See* A. 84a (court erred in failing to appoint counsel); A. 84a-88a (court should have differentiated between claims based solely on record and those which relied on materials outside the record). The Illinois Supreme Court denied Mr. Owens leave to appeal. (A. 56a.)

On direct appeal Mr. Owens also complained, as he had before the trial court, that his arrest by the Decatur police for car theft was not based on probable cause and was pretextual, thereby violating his rights under the U.S. and Illinois constitutions. *See* A. 60a-70a. The appellate court rejected this claim, holding that there was probable cause for the arrest because the complaining witness had filed a complaint and Mr. Owens admitted to police that he had been in possession of the car. A. 39a-40a. After the appellate court denied rehearing, Mr. Owens raised these same claims again in his fruitless Petition for Leave to Appeal to the Illinois Supreme Court. *See* A. 89a-95a.

REASONS FOR GRANTING THE WRIT

I. Mr. Owens's Arrest Was An Unconstitutional Pretextual Arrest, Unsupported By Probable Cause.

The trial court erred in denying Mr. Owens's motion to quash arrest and suppress evidence because his arrest was unconstitutional under the Fourth Amendment as a pretextual arrest, unsupported by probable cause. *See* A. 60a-70a; A. 89s-95a. The Appellate Court of Illinois' decision compounded this error by affirming an unconstitutional arrest and questioning that was, again, unsupported by probable cause.

The record establishes that Decatur police arrested Mr. Owens for the theft of his girlfriend Michelle Buckner's car only in order to interrogate him about the murder of Ms. Wright, the crime with which he was ultimately charged. This, as Mr. Owens has repeatedly argued, was an impermissible pretextual arrest. The Appellate Court upheld the denial of Mr. Owens's motion to quash arrest and suppress evidence because it concluded (a) there was probable cause to support the initial arrest for theft, and (b) once in custody, Mr. Owens voluntarily answered police questions regarding the theft and the murder. A. 39a-40a. This analysis is inconsistent with the facts and the law, and the Appellate Court's decision thereby cemented the unconstitutionality of Mr. Owens's plight. (*Id.*)

First, there was no probable cause to arrest Mr. Owens for the vehicle theft. As an initial matter, Ms. Buckner called the police station during Mr. Owens's interrogation to inform or remind the police that Mr. Owens had her permission to use her vehicle (and thus could not be guilty of its theft). (Rec. V. 10, pp. 44-47; Rec. V. 32, p. 19-20) Further, regardless of whether there existed probable cause to arrest Mr. Owens for the theft before Ms. Buckner's call—and there was not—probable cause vanished after the call, and Mr. Owens's continued detention and interrogation from this point forward were clearly unlawful. *See People v. Brownlee*, 713 N.E.2d 556 (Ill. 1999). The illegality of the detention vitiates any consent Mr. Owens may have given while detained. *Id.*

Second, even prior to the Buckner telephone call, there was never probable cause to arrest Mr. Owens for the auto theft. Of the several alternate definitions of "theft" in Section 16-1 of the Criminal Code, the only one which could possibly have applied to Mr. Owens's conduct was section 16-1(a)(1), which provides that "A person commits theft when he *knowingly* *** Obtains or exerts *unauthorized* control over property of the owner." 720 ILCS 5/16-1(a)(1) (West 2000) (emphasis added). Every officer who spoke with Ms. Buckner prior to Mr. Owens's arrest acknowledged that Ms. Buckner either said that Mr. Owens had permission to drive the vehicle or at least that she had told Mr. Owens he had permission to drive the vehicle. By definition, possession with the owner's permission is not theft, nor is possession with an unknown lack of permission. Thus there was *never* probable cause to arrest Mr. Owens for the theft.

Mr. Owens explained to the Appellate Court that there was no probable cause for his arrest for the reasons set forth above, but the Appellate Court quickly rejected that argument. The Appellate Court held that Mr. Owens's "arrest for the theft of Buckner's vehicle was valid" for three reasons: (i) the police had received a complaint from Ms. Buckner that her car was reported stolen and that Mr. Owens may have been involved; (ii) the police located the car in a known drug area and found it had been damages; and (iii) Mr. Owens called the police and admitted he knew where the vehicle was parked. (A. 39a-40a.) Absent from the court's probable cause analysis was the crucial fact that Ms. Buckner had informed Decatur police officers that Mr. Owens had permission to use her car. This omission is especially curious in light of the Appellate Court's own finding that Ms. Buckner "explained [to the officer] that [Mr. Owens] had permission to use the car . . . ." (A. 30a.)

In short, the trial court erred in denying Mr. Owens's motion to quash and suppress, and if this Court grants a writ of certiorari, Mr. Owens will present a thorough demonstration of why this Court should overturn that ruling.

II. This Court's Guidance Is Needed To Clarify That Illinois' Practice Of Manufacturing Probable Cause To Validate A Pretextual Arrest Is Unconstitutional.

Even if one could argue that probable cause existed by virtue of Ms. Buckner's complaint and Mr. Owens's admission to the police that he had knew where the car was parked, this Court should grant *certiorari* to clarify that police action to "manufacture" probable cause in light of completely exonerating evidence violates the Fourth Amendment. This Court's decisions in *Whren v. United States*, 517 U.S. 806 (1996) and *Arkansas v. Sullivan*, 532 U.S. 769 (2001), have established the critical importance of probable cause in the pretextual arrest analysis. However, what has been left unanswered is whether police action aimed purely at manufacturing probable cause to validate an otherwise pretextual arrest violates the Fourth Amendment. *See United States v. Hyppolite*, 65 F.3d 1151 (4th Cir. 1995) ("[T]he Fourth Amendment would mean little if officers could manufacture probable cause").

This Court's guidance is needed to clarify this important constitutional question. Here, the arresting officers either ignored or were not made aware of clear exonerating evidence when they arrested Mr. Owens's for the car theft. As noted above, every officer who spoke with Ms. Buckner prior to Mr. Owens's arrest acknowledged that Ms. Buckner told them either that Mr. Owens had permission to drive the vehicle or at least that she told him he had permission to drive the vehicle. By definition, possession with the owner's permission is not theft, nor is possession with an unknown lack of permission.

Under this Court's decisions in *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 568 (1971) and *Illinois v. Andreas*, 463 U.S. 765 (1983), the knowledge of one officer cooperating in the investigation is presumed to be shared be all the other officers working the case. Thus, if the knowledge of the officers who had spoken with Ms. Buckner had been imputed on the arresting officers, there could have been no probable cause for Mr. Owens's arrest for the car theft charge. *See Whiteley*, 401 U.S. at 568 ("[A]n otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.").

The Appellate Court expressly relied on three facts to support its finding of probable cause: (i) Ms. Buckner's filed of a complaint that her car was stolen; (ii) the police found the car damaged and in a drug zone, and (iii) Mr. Owens admitted knowing where the car was parked. (A. 39a-40a.) However, the Appellate Court did not consider the crucial fact that Ms. Buckner had given Mr. Owens her permission to use the car—permission which had been repeatedly communicated to police officers working the Wright murder. Evidence that Mr. Owens's had permission to use Ms. Buckner's car vitiates any finding that Mr. Owens could have *stolen* (i.e. possessed without Ms. Buckner's consent) Ms. Buckner's car. The only way that probable cause could have existed is if the arresting officers turned a blind eye to this clearly exonerating evidence. Ignoring critical evidence to generate a claim for probable cause for an arrest in the very definition of "manufacturing" probable cause.

Given the importance of probable cause in the pretextual arrest analysis, this Court should grant *certiorari* to clarify that police conduct that seeks to circumvent the probable cause requirement by ignoring key evidence that would eliminate probable cause for the arrest, is contrary to the protections of the Fourth Amendment. This Court's guidance is needed to clarify this important constitutional issue, not only to provide relief to Mr. Owens, but to provide guidance for the disposition of future cases.

III. This Court Should Grant *Certiorari* To Put A Stop To Illinois' Unconstitutional Practice Of Denying Indigent Defendants The Assistance Of Counsel On Certain Post-Trial Motions.

Mr. Owens also requests that this Court grant *certiorari* because the disposition of his post-trial motion raises grave Sixth Amendment concerns.

As noted, the trial court denied Mr. Owens the assistance of counsel before denying his *pro se* post-trial motion in its entirety. See A. 20a-22a. As Mr. Owens consistently argued before the Illinois reviewing courts, the trial court erred both because (a) the trial court should have distinguished between claims which did and did not rely on matters outside the record, and dismissed (rather than denying) the former, and (b) because Mr. Owens should have received the assistance of counsel on his motion. It was fundamentally unjust to deny on the merits, without any assistance by counsel, those claims relying on materials outside the record.

Mr. Owens has never had the chance to develop such claims with the assistance of counsel, and it is unconstitutionally possible that he never will, if the trial court's denial of such claims results in them being barred in post-judgment proceedings. *See People v. Blair*, 831 N.E.2d 604, 619-20 (Ill. 2005) (trial court denial of claims in *pro se* post-trial motions without appointing counsel accorded *res judicata* effect in post-conviction proceedings). This would have the perverse effect of actually making Mr. Owens *worse off* for raising his claims promptly: if he had simply stood mute with respect to those claims which relied on materials *dehors* the record, they would clearly *not* be waived in subsequent post-conviction proceedings. *People v. Munson*, 794 N.E.2d 155, 166 (Ill. 2002).

As it stands, as a result of the decision of the Illinois appellate court and the Illinois Supreme Court's refusal to take the case, Illinois law leaves an unconstitutional ambiguity as to whether and when a defendant must raise claims of ineffective assistance of counsel—specifically claims which are based on information outside of the record on direct appeal (as were many of Mr. Owens's claims). The well-established rule in Illinois is that matters outside the record are to be brought on post-conviction proceedings, and cannot be considered on direct appeal or even in a post-trial motion. *See, e.g.*, *People v. Yarbrough*, 444 N.E.2d 493, 496 (Ill. 1982). Some cases, however, including possible misreadings of the appellate court's decision in this case, could be interpreted as suggesting that ineffective assistance claims involving matters outside the trial record could be brought on direct appeal (because the appellate court errantly affirmed the trial court's denial of Mr. Owens's entire motion, rather than dismissing those claims which relied on matters outside the record). There is an important need for clarification of the law, in order to prevent grave injustice. The current uncertain status of the law regarding whether a defendant must, may, or must not raise such claims in a post trial motion does a grave disservice to defendants at a time when Illinois denies them the help of counsel.

The unconstitutional dilemma facing a defendant is illustrated by Mr. Owens's case. Immediately after trial, he promptly filed with the court a written post-trial motion, numerous paragraphs long, alleging the many and various ways in which his counsel had rendered ineffective assistance. Mr. Owens attached dozens of pages of exhibits which supported his claims. The circuit court dismissed his petition, however, without any investigatory or evidentiary proceedings (erroneously, as Mr. Owens argues). Thus despite his specific request (*see* A. 98a), Mr. Owens never received the benefit of any assistance by counsel in organizing and arguing his numerous concerns, or deciding which claims to raise, let alone any help in investigating the facts outside the trial record, researching, or filing any additional materials that might have helped to demonstrate that counsel's assistance fell below constitutional standards.

If Mr. Owens should fail to obtain relief from this court, he will initiate post-conviction proceedings. When Mr. Owens raises his claims there (where they should be raised), he will receive the assistance of counsel unless his petition is deemed "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2000) (dismissal standard); 5/122-4 (counsel appointed to assist once a petition has survived dismissal). On post-conviction, Mr. Owens's allegations will be taken as true, and he will receive the assistance of counsel so long as his *pro se* allegation sets forth a "gist" of a claim, with "a limited amount of detail." *People v. Edwards*, 757 N.E.2d 442, 445 (Ill. 2001).

Mr. Owens's claims undoubtedly will clear this very low bar. But the trial and appellate courts' decisions could be read to imply that his claims have already been adjudicated on the merits. To be clear, the appellate court may have reached the correct result in ruling against Mr. Owens on those portions of his post-trial motion which refer to matters outside the record, if the reason for that decision was that those arguments should be reserved for post-conviction. After all, Illinois law is clear that circuit courts may not consider matters outside the record in disposing of a motion for a new trial. *See Yarbrough*, 444 N.E.2d at 496.

But the appellate court simply affirmed without addressing this issue, which muddies the waters, raising a concern that Mr. Owens's arguments which otherwise could be raised on post-conviction would be barred because of the rulings on his post-trial claims of ineffective assistance. *See Blair*, 831 N.E.2d at 619-20. While no court on post-conviction *should* find that his claims are barred, the risk remains. *See Blair*, 831 N.E.2d at 619-20. By affirming the circuit court's order denying defendant's post-trial motion on the merits (see A145-50), the appellate court might be deemed to have ruled that the claims were properly raised. Based on *Yarbrough,* the appellate court should have vacated the circuit court's order denying the motion and directed the court to dismiss the claims as premature, so that defendant could raise them without prejudice in post-conviction.

This Court should grant *certiorari* to address the Sixth Amendment and Due Process concerns attendant on the current uncertain state of Illinois law.

In the alternative, Mr. Owens contends that if it is proper to raise claims of ineffective assistance which refer to matters outside the record in a *pro se* post-trial motion, then the denial of assistance of counsel on that motion was Constitutional error. The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right *** to have the assistance of counsel for his defense" (U.S. Const. amend. VI). Pre-appeal motions for a new trial are a "critical stage" of Illinois criminal proceedings, such that the Sixth Amendment guarantee is operative. *People v. Abdullah,* 785 N.E.2d 863, 872 (Ill. App. 2002); *People v. Finley,* 379 N.E.2d 645, 650 (Ill. App. 1978); *Johnston v. Mizell,* 912 F.2d 172, 176 (7th Cir. 1990), *cert.* denied, 498 U.S. 1094, 112 L. Ed. 2d 1067, 111 S. Ct. 982 (1991); *United States ex rel. Townsend v. Young,* 2001 U.S. Dist. LEXIS 11800, *22 (N.D. Ill. 2001); *United States ex rel. Simpson v. Thomas,* 1997 U.S. Dist. LEXIS 3351, *12-*13 (N.D. Ill. 1997). Mr. Owens was "entitled to separate counsel to pursue his ineffective assistance claim" in his motion for new trial. *Robinson v. Norris*, 60 F.3d 457, 460 (8th Cir. 1995). The deprivation of counsel is presumed prejudicial, regardless of the fact that counsel was still representing Mr. Owens on the post-trial motion which counsel filed on Mr. Owens's behalf. *Robinson*, 60 F.3d at 460.

This Court should grant *certiorari* not only to provide relief to Mr. Owens, but also to provide guidance for the future disposition of claims such as those he has raised, which at present fall into the cracks between Illinois' rules barring courts from considering matters outside the record and the rules requiring litigants to raise all claims or risk waiver.

Mr. Owens recognizes that in an ordinary case, this Court should not be presented with claims of ineffective assistance of counsel in the absence of a fully developed record, including review on the merits by the courts in the procedural progression leading to a *certiorari* petition. Here, however, because of the Illinois courts' failure to recognize the weight of the concerns Mr. Owens has raised, there is a lack of clarity as to whether his arguments can or must be raised on direct appeal. Accordingly, out of an abundance of caution, Mr. Owens contends in the alternative that this Court should either address the merits of Mr. Owens' ineffective assistance claims or remand with directions that the Illinois courts consider his arguments on the merits. The record to date confirms the merit of Mr. Owens's arguments. As Mr. Owens summarized below (See A. 74a-79a), trial counsel failed to raise valid and weighty challenges to critical portions of the State's case, including the DNA evidence which was the sole evidence purportedly linking Mr. Owens to the crime. Indeed, counsel refused to provide the necessary DNA materials to an independent expert for whom defendant and his family were willing to pay. Moreover, the defense case in this capital prosecution lasted only 20 minutes, despite the fact that Mr. Owens and his family called counsel's attention to numerous witnesses and evidence which could have been introduced to support the argument that Mr. Owens did not in fact commit this crime.

Finally, due again to the waiver concerns noted above, Mr. Owens notes that before the Illinois reviewing courts, he raised numerous errors, all of which he contends required reversal or vacating of his conviction or sentence, and which Mr. Owens also raises by reference before this Court and will brief in detail if this Court grants *certiorari*. Mr. Owens specifically preserves for review each of the points he argued in the Illinois courts, including but not limited to his objection to the circuit court's erroneous consideration of DNA evidence and uncorroborated hearsay at his sentencing hearing.

CONCLUSION

For all of the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Dated: December 21, 2007

Respectfully submitted,

JOHN J. HAMILL*
JOHN K. MIN
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* Counsel of Record

APPENDIX

Appendix A

CIRCUIT COURT OF ILLINOIS
SIXTH JUDICIAL CIRCUIT
MACON COUNTY

PEOPLE OF THE	)	Case No. 00 CF 891
STATE OF ILLINOIS	)	
vs.	)	Date of Birth: 8-9-68
	)	
Earl Owens, Defendant.	)	

JUDGMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above named defendant has been adjudged guilty of the offenses enumerated below and the Court having considered the statutory factors required to impose sentence FINDS:

☐ 1. The conduct leading to conviction for the offenses enumerated in Count(s) __ resulted in great bodily harm to the victim (730 ILCS 5/3-6-3(a)(2)(iii)).

☐ 2. The defendant is convicted of a Class __ offense, but sentenced as a Class X offender pursuant to 730 ILCS 5/5-5-3(c)(8).

☒ 3. The defendant has been convicted of First Degree Murder and no good time credit shall be applied (730 ILCS 5/3-6-3(a)(2)(1) or (2.2)).

IT IS THEREFORE ORDERED as follows:

A. That the defendant be and is hereby sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

CT I
OFFENSE First Degree Murder
DATE OF OFFENSE 6/11/00 - 6/12/00
STATUTORY CITATION 720 ILCS 5/9-1(a)(1)
CLASS M
SENTENCE 60 years
M.S.R. 3 Yr.

☐ B. That the sentence imposed in this cause shall be concurrent to the sentence imposed in the Circuit Court of Macon County.

☐ C. The defendant is entitled to time served on periodic imprisonment for the duration of its term from __ to __, for a total of ___ days.

☐ D. The defendant is entitled to a credit for time served awaiting sentence on a bailable offense of __ days; and a corresponding credit against $_ fine of $_ ($5/day).

☒ E. The defendant is entitled to credit for time actually served in custody of 1310 days in custody as of the sentencing date of January 15, 2004. Dates in custody are June 15, 2000 - January 15, 2004.

☒ F. That the Clerk of the Court deliver a copy of this order to the Sheriff.

☒ G. That the Sheriff take the defendant into custody and deliver him to the Department of Corrections, which shall confine said defendant until expiration of his sentence or until he is otherwise released by operation of law.

☒ H. This order is effective immediately.

☒ I. IT IS FURTHER ORDERED that the defendant is ordered to pay the costs of prosecution herein. These fees, costs and restitution (if applicable) are reduced to judgment against the defendant and are declared a lien upon the defendant's property.

☐ J. IT IS FURTHER ORDERED that ____________________.

DATE: 1-16-04 ENTER: __/S/__
JAMES R. CORYELL ASSOCIATE JUDGE

CLERK'S CERTIFICATE

STATE OF ILLINOIS)
) SS.
COUNTY OF MACON)

The undersigned Clerk of the Circuit Court does hereby certify the above to be a true and complete copy of the Sentencing Judgment entered of record in said Court in the above entitled cause.

Signed and Sealed before me

____/S/________, 2004
Clerk of the Circuit Court

SHERIFF'S CERTIFICATE

STATE OF ILLINOIS)
) SS.
COUNTY OF MACON)

I certify that I have delivered the person named in the within Sentencing Judgment to ______________ on _________, _____.

Dated ____________, _____

By: ________________________
Sheriff

By: ________________________
Deputy

Appendix B

CIRCUIT COURT OF ILLINOIS
SIXTH JUDICIAL CIRCUIT
MACON COUNTY

PEOPLE OF THE STATE OF ILLINOIS
vs.
EARL OWENS
No. 00-CF-891

POST-TRIAL MOTIONS
And
SENTENCE HEARING

REPORT OF PROCEEDINGS of the Motions and Sentence Hearing before the Honorable James R. Coryell, on the 15th day of January, 2004.

APPEARANCES:

MR. JACK AHOLA and MR. JAY SCOTT, Assistant State's Attorneys for the People of the State of Illinois.

MR. JEFF JUSTICE and MR. TOM GRIFFITH, Counsel for the defendant.

Wendy L. Reeves, CSR #084-003894
Macon County Courthouse
Courtroom 3B
253 East Wood Street
Decatur, IL 62523
Phone: (217) 424-0858

(THE FOLLOWING PROCEEDINGS WERE HAD JANUARY 15, 2004, BEFORE THE HONORABLE JAMES R. CORYELL.)

THE COURT: Ladies and gentlemen, what we've done is we're going to start the post-trial motions and/or sentencing phase of the trial now. If you are here and you plan on leaving during the course of this phase, leave now. Because what we're going to do is close off the courtroom and you won't be able to leave or come in until the next recess. So, anyone that plans on leaving, now is the time.

Now, we have a Post-Trial Motion that counsel's filed. We have a Pro Se Post-Trial Motion filed today and I think it's untimely. Mr. Scott, have you seen it?

MR. SCOTT: I just received it, yes.

THE COURT: I think the proper procedure is to take up that motion and address his claims now. If there's determined to be any merits to them, then proceed on. I think it's untimely, first of all.

MR. SCOTT: I do too. Let's take a look at it.

THE COURT: Mr. Scott, have you had a chance to read the motion?

MR. SCOTT: I've given it a cursory review, Judge.

THE COURT: Mr. Owens, I've read your motion and your claim is that your counsel was ineffective. We've got a lot of conclusions here. What, specifically, is your complaint? You've got complaints about some things, issues, that he they raised at the trial that you got adverse rulings on, such as certain witnesses that I refused to allow them to call. That's not ineffective assistance. That's an issue that they have raised and I've ruled on.

THE DEFENDANT: Right, but there's also witnesses that they didn't call at all that you never even got a chance to rule on that witness. I had a witness list with about 28 people on it and there was more added.

THE COURT: You got a number of people that saw people walking in the neighborhood is what's contained here, and this neighborhood is across the street from

a public park in which there were probably thousands of people walking around the day that the body was found and the day before.
THE DEFENDANT: Actually, it's not a public park. It's a golf course.
THE COURT: It's a public golf course attached to a park. It's not a private golf course.
THE DEFENDANT: There's a lot of other witnesses,

Your Honor, that were called.
THE COURT: Who?
THE DEFENDANT: Dean Paisley for the Appellate Defenders --
THE COURT: Who?
THE DEFENDANT: My investigator. I mean, he was never called. He wanted to testify, but he never was called.
THE COURT: What was he going to testify to?
THE DEFENDANT: He was going to testify to some of the people that he interviewed, and he was going to testify to --
THE COURT: What people?

THE COURT: Just about everyone on the interview list.

THE COURT: Do you have any specifics? This is an investigator that your lawyers used to help them with their investigation; is that correct?

THE DEFENDANT: Yes, and he was actually suppose to be one of the witnesses in the case also.

THE COURT: Okay. Well who, specifically, didn't they call? And what would that person have testified to?

THE DEFENDANT: Alva Bush, he was a crime specialist for the defense. She was going to testify that there was evidence moved around. She was going to testify that there was other footprints on the blanket that weren't added up to the footprints that they so-called said that was on the blanket.

THE COURT: Didn't that evidence come out at the trial? Wasn't there evidence that there were other footprints at the crime scene and on the coverlet?

THE DEFENDANT: No.

THE COURT: I think there was a photograph that was received.

THE DEFENDANT: A photograph of one of the shoes that was suppose to have been my shoes were the foot print that was found on that and my brother and his fiancee were suppose to testify. They looked at the shoes and was shown a picture of the shoes, actually, and the shoes, you know, there was two different pictures. One of the pictures that was shown the first day when Detective Beck was suppose to have taken a picture of my shoes in my living room, they brought a different picture around and showed a different pair of shoes. The first pair of shoes were the shoes that were in my living room next to my TV, and those were my shoes, and I don't know where those shoes are now.

The shoes that were retrieved from my bedroom weren't my shows and those were the shoes that were in the trial.

THE COURT: And your stepfather testified to that. Your step-father said he did not give you those shoes. He never seen you with and your resources was limited and he didn't think you had a lot of money to be buying a lot of other shoes; correct?

THE DEFENDANT: Right. I suppose. And Michelle Buckner, she wasn't able to testify. That was my girlfriend at the time.

THE COURT: What was she going to say?

THE DEFENDANT: That she didn't identify the shoes in the photos as being mine and it was said that she did, but she didn't. And she was going to testify to the same thing that my brother was, that there was two different pictures of two different pairs of shoes and also the Fire Department Captain, Kevin O'Brien, he discovered the victim dead in her room and trampled over numerous papers and shoes that were similar to the shoes that were so-called found in my bedroom.

An investigator from the Illinois Appellate

Defender's Office, Dean Paisley, he was suppose to present and discuss limited interviews with some of the witnesses that were never called to verify statements that would have been supportive in the trial, you know, on my behalf.

THE COURT: So, they didn't call Mr. Paisley to testify about witnesses that they directed him to interview?

THE DEFENDANT: Yes.

THE COURT: Anything else?

THE DEFENDANT: Yeah. Lisa Owens, my daughter, and you know a couple other of my kids seen a black, male going into Mary Ann's house more than once because Mary Ann's house is in my back yard, basically, and when they're out playing in the back yard, my back yard is facing her door and they, you know, they said they seen, you know, people going in and out of Mary Ann's house over the course of time that we lived there in the neighborhood and, you know, they were asked, was there any black people going in that house and he said there was a black male and they don't know what he was there for, if he was cutting the grass or whatever he was there for, but they did say they seen one.

THE COURT: These were witnesses that were interviewed by Mr. Paisley and your lawyers; is that correct?

THE DEFENDANT: Yes. And there was -- well, there was a Susan Wilmert and Cheryl Scott they said they saw a regular stalker in the neighborhood and they identified him and they were shown a picture and it wasn't me, and the same thing with Lee Card and my mother, on October 27, 2003, was subpoenaed by the State and was asked to look at photographs of shoes allegedly taken out of my home and the testimony was that the shoes she picked up out of the living room were placed in the bedroom on June 14, 2000, were not the same shoes in the photograph shown to her by the State's Attorney and the State investigator. She was told she would not be called by the State, but she would most likely be called by the defense, but she never was.

THE COURT: Was your mother interviewed by your counsel?

THE DEFENDANT: Yes. I think she was interviewed by the State also, but you know one of the main points that I wanted to make was six months before this trial even started, Mr. Justice and I spoke and he told me it kind of looks like a no-win situation, and I said look, "I'm innocent, man. I didn't commit these

crimes, and you tell me this is no-win situation. You're telling me you can't win this case. Well, will you please step down so I can find counsel, you know, that has a different point of view,'" and he said, "No. I'm not going to step down." He said he's not going to be --he's not going to have anything to do with my little stall tactics I said, "Look, man, this is my life here, man, you know. My family, over the course of maybe a week before the trial started, I know at the time frame here you're going to say that, you know, it's a short time period, but you know we were -- we were doing a lot. You know, me and my family, you know, besides what my so-called lawyers were doing. I have no idea. Because I really don't know what they did. I have no idea, but my family actually hired an independent laboratory as far as the DNA is concerned. Doctor --

THE COURT: You've got --

THE DEFENDANT: Bulandagore (Spelled phonetically.) and he looked over the DNA, the stuff that they had, and he said that it would be impossible to evaluate an analysis from the materials that they have and they faxed them different emails and everything and he's asked for certain materials and my lawyers --

THE COURT: Excuse me Mr. Owens, is this the letter of November 5th, 2003, that you're referring to, from Dr. Bulandagore. Is that what you're talking about?

THE DEFENDANT: There was also an E-mail September 25th also asking for materials that I have in here also.

THE COURT: Is this a letter to your mother, apparently, that he wrote on November 5th; is that right?

THE DEFENDANT: Dr. Bulandagore?

THE COURT: Yeah, You've got it marked Exhibit C1.

THE DEFENDANT: Yes.

THE COURT: This is material your mother has sent for this Dr --

THE DEFENDANT: Actually, Dr. Dean Paisley asked for certain materials from my attorneys and my attorneys said that they have to get that material from Jennifer Lu, and I'm not really sure if they ever got in touch with each other, Jennifer Lu and Dr. Boone. (Spelled phonetically) All I know is Dr. Boone said that those materials were never sent to him and the stuff that was sent to him, there's no way you could get an analysis from what was sent to him and he stated that --

THE COURT: What day was the verdict in your case, Mr. Owens?

THE DEFENDANT: I don't know. December 10th, I think.

THE COURT: The record indicates that the jury returned a verdict on November 7th.

THE DEFENDANT: Uh-huh.

THE COURT: And I believe on November 7th, the only thing we had was closing arguments; is that right?

THE DEFENDANT: Your Honor, I asked you on a couple different occasions there --

THE COURT: Go ahead with the rest of what you have to say about your lawyers. Go ahead.

THE DEFENDANT: Okay. This doctor says on November 5th -- okay. Now, the back to what I was saying about November 5th, at the time I had asked Mr. Justice, I asked him if he could continue my trial if anything, even for a month, a month and three weeks, I asked him for anything, you know, just a little bit more time because all he kept telling me is, I'm going to loose, I'm going to loose we're going to loose. I'm saying, let me have a little more time to try to fight, you know, cause you're not giving me a chance here. You know, cause I'm telling you I'm innocent and you're not listening to me, you know. On November 5th, 2003, the laboratory directed an independent forensic, Dr. Boone wrote a letter to my mother informing her that he did not have sufficient information to make an independent evaluation analysis of data.

THE COURT: Right. The letter is in the record. I understand what the letter says.

THE DEFENDANT: Right, and he also said that the DNA could have been misleading or deceptive just by what he had.

THE COURT: Anything else? I mean, I understand that the letter is in the motion. I've read the letter. Was there any independent evaluation done or any genetic testing consultant contained.

THE DEFENDANT: Well, Your Honor, that's what we're trying to accomplish but my lawyers -- I asked my lawyer for a continuance he said well, "We're getting ready to start a trial. We don't have time for that right now." I said, "This is my live we're talking about right here. We don't have time to investigate this case a little further to see what's going on here?." You know, Your Honor, that's the bottom line of this whole motion right here is, I have had ineffective counsel. You know, I didn't even want these two guys on my case. Judge Greanias appointed them when I asked him, you know, I said, "Please, let me have a little more time to try to find an attorney. My family is going to try to come up with some money." "Well, no, you're going to take these lawyers or you're going to represent yourself." I don't know anything about this, you know, but I do know that my life is on the line here and you know I've been convicted of a crime I didn't commit and, you know, I've asked these guys over and over again and, you know, to help me and they haven't helped me in the least. My family have done more in the last year than these guys put together, you know. That' s it.

THE COURT: Mr. Scott, anything you want to say about this?

MR. SCOTT: No. No.

THE COURT: I've read the motion. I've looked at some of these exhibits and this does not meet the threshold of even appointing new counsel. The

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allegations are that the defense lawyers and an investigator interviewed potential witnesses and, for reasons I don't know why they made their decision, but the calling of witnesses is a trial strategy decision to be made by trial counsel. The obligation of trial counsel is to conduct an investigation and make a decision, make and informed decision, on whether or not to call witnesses. The allegations are that they made -- they conducted the investigation. They consulted with the witnesses and made a determination that some of them they didn't call and some of them I ruled their testimony was not admissible.

As to the DNA experts, we've got a file cabinet full of bills showing that testing laboratories were consulted and interviewed. So, I'm going to find that the motion does not meet the threshold for the appointment of new counsel, that the defendant has not made anywhere near a prima facie case of ineffective assistance and what, in fact, the defendant is doing is second guessing trial counsel's strategic decisions where the evidence all is that they conducted an investigation and made a determination. He's complaining about his lawyer telling him he's in a no-win situation which can be an assessment of the

situation that the lawyer makes after getting the case ready for trial. The lawyer's obligation is to tell you where you stand rather than telling you what you want to hear. So, I'm denying the post-trial motion. Now, we have the post-trial motion filed by defense counsel. Who's going to argue that? Mr. Justice, go ahead.

MR. JUSTICE: Your Honor, we've had extensive arguments over the Motion for Summary Judgment, so with regard to Paragraph 1 --

THE COURT: To Motion to Suppress.

MR. JUSTICE: I'm sorry. You're right. Getting back to this criminal case, and I -- we've argued those before Judge Greanias. We've argued them before you. So, we would adopt those arguments. With regard to Paragraphs 2, 3, 4, 5, those are arguments that I recognize relate to Phases 2 and 3 of a death penalty case, and they are placed in there to preserve these issues. I do not wish to argue them. With regard to paragraph six, the argument that I would have before for you is that as we can see from the question the jury had at Phase 2, they were unclear about the different forms of the charge in this case and I think it shows that the general verdict form should not have been used, and the our instructions relating to a specific jury instruction should have been granted with regard to all of the additional arguments, we would adopt those we made with the jury instruction in Phase 1 of this trial. All of the other counts we specifically argued at the time that this court made its ruling. We would adopt those arguments and ask you to reconsider your thought process. Thank you.

THE COURT: As to Paragraph 1, this was litigated extensively. I think Judge Greanias had several days of hearing on the Motion to Suppress when new counsel was appointed. New counsel renewed the Motion to Suppress. I got a transcripts of the prior proceeding and reviewed that, and it's pretty lengthy, and came to the same conclusion that Judge Greanias did. As to Paragraphs 2 through 5. I think paragraphs 2 through 5, any claim of error in 2 through 5 were

rendered moot by the jury's verdict on the eligibility phase. As to paragraph -- excuse me, Mr. Scott, I didn't mean to preempt you.
MR. SCOTT: That's fine.
THE COURT: As to Paragraph 6, I mean, *People versus Travis* specifically addresses this question,

and 7, 8 and 9, those issues were raised in that ruling and I think I was right at the time, and I'm not going to change my ruling. So, motion is denied. Mr. Scott, I didn't mean to preempt you.
MR. SCOTT: I have no problem with that, Judge.
THE COURT: Okay. With the post-trial motions disposed of, we're ready to move to the sentencing phase. Mr. Scott, has the State received a copy of the presentence report?
MR. SCOTT: Yes, Your Honor.
THE COURT: Okay. There is, I think, one update on the presentence report. The custody date indicates June 15, 2000, through December 16th, '03. I think it is now January 15, '04, and them custody time is now

1,310 days. Are you in agreement with that?

MR. SCOTT: Yes.

THE COURT: Any other corrections or additions by the State?

MR. SCOTT: No, Your Honor.

THE COURT: I would also state that as the presentence report contains information that there is pending a case, 01856. The fact that there is a case pending, that fact alone, contained in the report, will not be considered. Mr. Justice, any additions or corrections by the defendant?

MR. JUSTICE: No. The only correction I had already made on my notes was to change it to 1,310.

THE COURT: In any event, the rest of the PSI is correct; is that correct?

MR. JUSTICE: Correct.

THE COURT: State, any evidence in aggravation?

Mr. SCOTT: Yes, Your Honor.

Your Honor, first I would submit People's Exhibit Number 46, which is a certified copy of the conviction listed in the presentence report in Macon County case 93-CM-5, and we have several witnesses to call.

THE COURT: Who's going to do this for the defendant? Mr. Justice, do you have any objection to this 46?

MR. JUSTICE: No.

THE COURT: 46 is received.

THE COURT: Okay. Mr. Scott, go ahead.

MR. SCOTT: People call Grace Casey.

(WITNESS BEING SWORN.)

GRACE CASEY

called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

Appendix C

NO. 4-04-0087
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
EARL A. OWENS,
Defendant-Appellant.

Appeal from Circuit Court of Macon County
No. 00C891

Honorable James R. Coryell, Judge Presiding.

ORDER

A jury convicted defendant, Earl A. Owens, of first-degree murder and the trial court sentenced him to 60 years in prison. In this direct appeal, defendant argues that (1) he is entitled to a new trial because the court erred in denying his motion to quash arrest and suppress evidence, (2) he is entitled to a new sentencing hearing because the court erroneously relied upon inadmissible evidence, and (3) the court erred in failing to conduct an adequate inquiry into defendant's *pro se* claim of ineffective assistance of trial counsel. We affirm.

I. BACKGROUND

On June 13, 2000, Decatur police officers arrested defendant for stealing his girlfriend Michelle Buckner's car. In a subsequent motion to quash arrest and suppress evidence (and in this appeal), defendant claims his arrest was merely pretextual and nothing more than a ruse by the police to get him into custody for the purpose of interrogating him about the June 12, 2000, murder of his neighbor, Mary Ann Wright. He claims the officers knew at the time of his arrest that Buckner did not intend to press charges against him for borrowing her vehicle. Nevertheless, the officers arrested defendant for theft at his mother's house and took him to the police station for questioning. While at the police station, defendant waived his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 469, 16 L. Ed. 2d 694, 720-21, 86 S. Ct. 1602, 1625 (1966), and consented to a search of his residence. This search revealed key evidence relating to Wright's murder, and that evidence was used as the basis for subsequently obtaining a warrant to search defendant's residence further. On June 15, 2000, defendant was arrested for Wright's murder.

The following is a summary of the testimony that was introduced at the three-day hearing on defendant's motion to quash arrest and suppress evidence. On June 11, 2000, defendant drove Buckner to her job at Burger King using Buckner's car. Defendant referred to Buckner as his common-law wife. They lived together and had two children together. Although the car was legally Buckner's, defendant had permission from her to use the car as his own. At the end of her work shift, Buckner expected defendant to pick her up. He did not. Instead, Buckner's mother picked her up from work at 12:30 a.m. on June 12, 2000. Defendant had called Buckner's mother and told her that the car had run out of gas and he was not going to be able to pick Buckner up from work as planned. When Buckner got home, neither defendant nor the car was there.

Buckner awoke at 4 a.m. and found defendant in their kitchen playing video games. She went back to bed and woke again at 7 a.m. Again, neither defendant nor the car was there. However, the car keys were laying on the kitchen table. Buckner called defendant's sister-in-law, Amy Owens, to ask if she would help Buckner locate her car. Amy agreed. Amy and Buckner drove around to some of the locations that defendant had been known to frequent to no avail. Eventually, they stopped at 645 South 23rd Street in Decatur. This was the house that defendant and Buckner had just vacated because the power had been turned off, although they were still the designated tenants of the residence. Buckner knocked on the door but did not receive an answer. Apparently, defendant was inside the residence. He saw Buckner knock on the door through the window but did not answer because he was drunk and high and did not want Buckner to see him in that state. He had driven the car to a residence on Macon Street the night before, where he had consumed alcohol and drugs. Because he was too intoxicated to drive, he was not able to pick up Buckner from work (the story about running out of gas was not true) or drive home. Someone had given defendant a ride home before 4 a.m.

When Amy and Buckner were ready to continue their search for Buckner's car, a police officer approached Amy's vehicle and spoke with Buckner. The officer asked Buckner what she was doing at the residence. The officer explained that they were investigating a murder that had occurred next door a few hours earlier, and he was interested in speaking with all of the neighbors as part of his investigation. Buckner explained to the officer that she was searching for her car, that defendant had had it last, but she did not know if he was involved in its disappearance. She could not find defendant to ask him. The officer asked Buckner if defendant had stolen the car. She explained that defendant had permission to use the car but it had been missing since that morning. Contrary to Buckner's testimony, the officer testified that Buckner was adamant about reporting the vehicle as stolen and requesting the police arrest whoever was found with the car. Buckner said she meant for the police to pursue charges only against anyone other than defendant. After speaking with the officers, Buckner went home.

The next day, June 13, 2000, at 7 a.m., Buckner found defendant at their current home. He explained to Buckner that on June 11, 2000, he had been too intoxicated to drive, he had left the vehicle on Macon Street, and to his knowledge, it was still there.

Buckner called her supervisor for a ride to work. Along the way, they dropped off defendant at his mother's house. They drove to the Macon Street residence, where Buckner found her car with a rock thrown through the driver's side window. Although she had the keys, Buckner did not drive the car because the police had told her not to touch the vehicle but to contact them if she found it. Buckner called the police and informed them of her discovery. Defendant also called the police and told them that Buckner knew where the car was and she was not interested in pursuing any criminal charges against him related to the vehicle.

Meanwhile, a police officer drove to Macon Street to inspect Buckner's car. Because it was parked in a known drug area, had been reported stolen, and had been vandalized, the police asked Buckner for permission to search the car. She agreed and gave them the keys. Detective Steven Chabak, the officer who spoke with defendant when he called the police station on the morning of June 13, 2000, told defendant that he was sending an officer to pick defendant up at his mother's house for the purpose of bringing him to the station for questioning related to the vehicle. When he spoke with defendant on the phone, Detective Chabak knew the vehicle had been reported stolen, had been found in a known drug area, had been damaged, and defendant had been the last person to have the vehicle. Detective Chabak believed that a crime had been committed, and defendant was responsible. Chabak said, at the time, he also knew defendant was a neighbor of Wright's and that he had not been questioned as part of the earlier neighborhood canvass. According to Chabak, he sent a police unit to arrest defendant and called Buckner to ask if she wanted to pursue her theft complaint. Buckner told Chabak she did. Defendant was then arrested for theft of the car at his mother's house. As defendant was being arrested, the arresting officer saw defendant hand his mother a watch. Defendant told the officer that the watch belonged to Buckner. When the officer spoke with Buckner to get her permission to search the car, he asked her if that, in fact, was her watch. She said no.

Once defendant arrived at the police station, Detective Michael Beck, the officer assigned to investigate the murder, advised defendant of his *Miranda* rights (*Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)). Defendant agreed to sign a written waiver, and thereafter, Beck questioned defendant about the stolen vehicle. Approximately one hour later, the inquiry turned to the murder investigation. Beck said defendant told him he was carrying a pair of black boots down the street on the morning of June 12, 2000. Apparently, a witness had seen a black male carrying a pair of black boots down the street soon after the murder, so Beck said "he wanted to find those boots." He asked for and received defendant's consent to search his 645 South 23rd Street residence. Beck admitted that the request to search defendant's home was related solely to the murder investigation, not the stolen vehicle. Contrary to Beck's testimony, defendant said Beck had asked to search his home for fragments of broken glass from Buckner's vehicle. Defendant thought the search of his home would clear him of the stolen vehicle charge, so he agreed. Defendant was handcuffed while in the police car on the way to his house, he was uncuffed once he arrived at his house, and then recuffed on the return trip to the police station.

During the search, Detective Beck found a pair of black rubber boots in defendant's closet. The boots appeared to have blood smears on them. At that point, the police contacted the State's Attorney's office and were advised to obtain a search warrant. Beck placed the boots in the trunk of his police car and terminated the search. A search warrant was granted after laboratory tests revealed that the substance on the boots was human blood.

When the police officers and defendant returned to the police station, defendant agreed to give the officers a sample of his hair. Defendant was given a notice to appear on the vehicle theft charge and was released. He was arrested on June 15, 2005, two days later, for Wright's murder.

On February 27, 2001, after considering the evidence and argument of counsel, the trial court denied defendant's motion to quash and suppress. Approximately two years later, on April 17, 2003, defendant filed a motion to reconsider the court's order denying his motion to quash and suppress. On September 3, 2003, the court denied that motion. Defendant's case proceeded to a jury trial, which lasted six days from October 31, 2003, and November 7, 2003. On November 7, 2003, the jury returned a verdict of guilty of first-degree murder. On November 10, 2003, the jury found defendant was not eligible for the death penalty.

On January 15, 2004, the trial court conducted a hearing on defendant's *pro se* posttrial motion (filed the same day as the hearing), alleging the ineffective assistance of counsel. After questioning defendant about his allegations, the court denied the motion, finding defendant had not made "anywhere near a *prima facie* case of ineffective assistance."

The trial court immediately proceeded to defendant's sentencing hearing. The State adduced evidence that defendant was responsible (based upon deoxyribonucleic acid (DNA) evidence) for the March 1995 sexual assault of Janet Lashley. According to this evidence, defendant repeatedly raped Lashley, tied her to her bed, and lit the bed on fire. Lashley was able to escape but died in a nursing home several months later. An emergency room nurse who had treated Lashley testified that she had collected evidence for a sexual assault kit and delivered the same to a police officer. The police officer testified that he had received the kit from the nurse, placed it in an evidence vault, and then transported it to the Illinois State Police (ISP) crime lab. The ISP lab technician testified that he had received the samples and conducted a DNA analysis. The DNA profile did not match anyone in the database at the time. In 2001, the sample was submitted for further testing and it was determined that the DNA profile matched that of defendant.

After considering all of the relevant evidence and applicable statutory factors, the trial court sentenced defendant to 60 years in prison. Defendant's subsequent posttrial and postsentencing motions were denied. This appeal followed.

II. ANALYSIS

A. Motion To Quash Arrest and Suppress Evidence

Defendant first claims the trial court erred in denying his motion to quash arrest, quash the search warrant, and suppress evidence. He claims his arrest on the stolen-vehicle charge was merely a pretext used by the police to get him into police custody for the questioning of Wright's murder. He claims the police engaged in misconduct by making defendant believe he was waiving his *Miranda* rights and consenting to a search related solely to the investigation of the stolen and damaged vehicle, not the murder. He argues his consent to search was not voluntarily given, his custody was illegal, and the physical evidence found during the search must be suppressed. And, because it was the evidence found during the "consensual" search that supported the issuance of a search warrant, the warrant must be quashed as well. We disagree.

We begin with the proposition that "a suspect cannot be detained for custodial questioning on less than probable cause. *** Moreover, it is permissible for police officers to arrest a suspect on a minor offense and conduct questioning on a more serious offense and the arrest will not be deemed pretextual as long as the arrest on the minor offense is valid." *People v. Williams*, 233 Ill. App. 3d 1005, 1010, 599 N.E.2d 1033, 1036 (1992). In *People v. Anderson*, 169 Ill. App. 3d 289, 299-300, 523 N.E.2d 1034, 1041 (1988), the court stated: "Having effectuated a valid custodial arrest, there is no question that they [(the police)] had the authority to transport the defendant to the police station and question him about another crime of which he might have knowledge."

In denying defendant's motion to quash and suppress, the trial court found that under an objective standard, the police had probable cause to arrest defendant for the theft of Buckner's vehicle. The court found that the police had reason to believe that a crime related to the vehicle had been committed and defendant was responsible. The court also found that defendant knowingly and voluntarily waived his *Miranda* rights and voluntarily consented to a search of his residence. With a valid arrest and defendant's knowing and voluntary consent, the police officers were allowed to question defendant on any offense that they desired. We affirm the court's decision based upon the same analysis.

Defendant claims this is a matter of first impression. Although we agree that Illinois courts have not specifically addressed defendant's particular argument, *i.e.*, the validity of an arrest as merely a pretext for a search, we find several Illinois cases that support the police officers' conduct in this case. In a case cited by neither defendant nor the State, our supreme court in *People v. Evans*, 125 Ill. 2d 50, 530 N.E.2d 1360 (1988) reviewed a case involving a defendant convicted of murder. The police had arrested the defendant in his home on a totally unrelated charge (aggravated assault) and took him to the police station, where he later confessed to the murder. The defendant then argued that his arrest was a mere pretext or subterfuge to place him in custody for the purpose of questioning him about the murder. *Evans*, 125 Ill. 2d at 70, 530 N.E.2d at 1368. The court found that there was no pretextual arrest and "[m]erely because defendant was in custody for one charge does not preclude the police from investigating other unrelated charges concerning the defendant." *Evans*, 125 Ill. 2d at 72, 530 N.E.2d at 1369.

In *Anderson*, the Third District considered the case of a defendant who was suspected of murder and was known for his prior record of violent crimes and having a suspended driver's license. When the police found the defendant driving his car, he was arrested (without the issuance of a citation) for driving on a suspended license and taken to the police station for questioning. He waived his *Miranda* rights and spoke with the police for the next several hours, eventually confessing to the murder. The court stated that the United States Supreme Court's decisions have repeatedly stated that "in analyzing alleged fourth[-]amendment violations, an objective assessment of the officer's actions, not his state of mind, is what matters." *Anderson*, 169 Ill. App. 3d at 297, 523 N.E.2d at 1040, referring to *Scott v. United States*, 436 U.S. 128, 56 L. Ed. 2d 168, 98 S. Ct. 1717 (1978); *United States v. Villamonte-Marquez*, 462 U.S. 579, 77 L. Ed. 2d 22, 103 S. Ct. 2573 (1983); and *Maryland v. Macon*, 472 U.S. 463, 86 L. Ed. 2d 370, 105 S. Ct. 2778 (1985). The police officers' subjective intent or underlying motivations were of no consequence. *Anderson*, 169 Ill. App. 3d at 298, 523 N.E.2d at 1040. Because the officers had acted with legal authority in arresting the defendant on the suspended license charge, the defendant's confession was valid. *Anderson*, 169 Ill. App. 3d at 299-300, 523 N.E.2d at 1041.

In *People v. Hattery*, 183 Ill. App. 3d 785, 539 N.E.2d 368 (1989), the First District considered whether the defendant's arrest on an unrelated aggravated battery charge was a pretextual arrest used by the police to take him into custody and question him about a murder. The defendant had moved to suppress crucial statements that he had made to the police during the questioning. The trial court denied the defendant's motion, and the appellate court affirmed, finding that the defendant's "confession was not the product of an unreasonable seizure based on a pretextual arrest." *Hattery*, 183 Ill. App. 3d at 819, 539 N.E.2d at 391. Police officers wanted to question the defendant about his involvement in a murder, but the State's Attorney's office had denied authorization for a murder warrant for the defendant for a lack of evidence. The police then obtained a warrant for the defendant's arrest on an unrelated aggravated battery and questioned him about the murder once he was in their custody on the unrelated charge. Despite several *Miranda* warnings, the defendant proceeded to voluntarily discuss the murders. The court found the police officers' actions in arresting defendant for the unrelated aggravated battery and subsequently questioning him about the murder were objectively reasonable. *Hattery*, 183 Ill. App. 3d at 819, 539 N.E.2d at 391.

Given these authorities, we must determine whether the trial court erred in denying defendant's motion to quash arrest and suppress evidence on pretextual arrest grounds. The decision of the trial court on a motion to suppress will not be disturbed unless it is manifestly erroneous. *Hattery*, 183 Ill. App. 3d at 818, 539 N.E.2d at 390.

First, defendant's arrest for the theft of Buckner's vehicle was valid. The police had received a complaint from Buckner that her vehicle was reported stolen and that defendant may have been involved. The police located the car in a known drug area and found it had been damaged. Defendant called the police and admitted he knew where the vehicle was parked. Based on these facts and on an objectively reasonable standard, the police had reason to suspect that a crime had occurred and defendant was involved. Defendant's arrest was based on probable cause.

Second, once he was in police custody, defendant knowingly and voluntarily waived his *Miranda* rights and agreed to speak with the police. During the questioning that initially concerned Buckner's vehicle and then progressed into questions regarding Wright's murder, defendant revealed that he had been walking in his neighborhood while carrying his work boots -- a fact of particular interest to the police based upon witness accounts. Defendant subsequently consented to a search of his residence, where incriminating evidence was discovered.

Once defendant was legally in police custody, the officers had the authority and opportunity to question defendant as a neighbor and potential witness about the murder. Without objection and with full cooperation, defendant answered the officers' questions about the vehicle and the murder. The fact that defendant ultimately provided key evidence was not a product of improper police conduct. The fruits of the officers' search were a result of a lawful and constitutionally sound police investigation. From an objective standard, nothing in the record suggests that defendant's arrest was made other than in the ordinary course of investigation and for anything other than a proper purpose. We find the trial court's denial of defendant's motion to quash and suppress was not manifestly erroneous.

B. Sentencing Hearing

Defendant claims that his sentence should be vacated and the cause remanded for a new sentencing hearing because the trial court considered inadmissible evidence. Specifically, he claims (1) the State did not lay a proper foundation for the introduction of the DNA evidence, and (2) the testimony of Detective Michael Beck was uncorroborated hearsay evidence.

In March 1995, an intruder broke into Janet Lashley's home, repeatedly raped her, tied her naked body to her bed, lit the bed on fire, and fled. The fire burned through the ropes and Lashley was able to escape from the home. No one was ever charged with the crime. However, at defendant's sentencing hearing, the State presented testimony that defendant committed the crime. An emergency room nurse testified that she had prepared a sexual assault kit on Lashley. The nurse delivered the sample to a police officer who delivered the sample to the ISP crime lab, which then forwarded the sample to Cellmark (a certified testing laboratory) via Federal Express. The State called the emergency-room nurse, the police officer, and the ISP crime-lab technician. However, the State failed to present testimony from a representative of Cellmark. Defendant claims this break in the chain of custody was fatal to the admissibility of the DNA evidence because once at Cellmark, defendant claims, the sample was the "most vulnerable to tampering, contamination[,] or exchange . "

Defendant relies on *dicta* set forth in *People v. Taylor*, 357 Ill. App. 3d 220, 828 N.E.2d 799 (2005), a case where the defendant was convicted of aggravated criminal sexual assault. The only direct evidence linking the defendant to the crime was DNA evidence, as the victim was unable to identify the defendant as her attacker. The defendant appealed his conviction, claiming the State had failed to call as a witness the technician who had actually performed the DNA testing. Without addressing the merits of the defendant's claim, the Fifth District found that the defendant had forfeited his argument on appeal for failing to object at trial. However, in *dicta*, the court referred to the State's attempt to lay a foundation as "minimal" and "deficient." *Taylor*, 357 Ill. App. 3d at 224-25, 828 N.E.2d at 803. It is that characterization upon which defendant relies.

We find defendant's reliance on *Taylor* is misplaced for three reasons. First, the court's comments were mere *obiter dictum* and therefore nonprecedential. See *People v. Grever*, 222 Ill. 2d 321, 336, 856 N.E.2d 378, 386 (2006) (*obiter dictum* is an expression or opinion of the court but is not precedential or binding). Second, a missing link in the chain of custody goes to the weight, not the admissibility, of the evidence. See *People v. Woods*, 214 Ill. 2d 455, 467, 828 N.E.2d 247, 255 (2005). Third, it is obvious from the trial court's comments at the sentencing and postsentencing hearings that it placed little weight on the evidence from the Lashley crime.

Our supreme court has stated:

> "The State bears the burden to establish a custody chain that is sufficiently complete

to make it improbable that the evidence has been subject to tampering or accidental substitution. [Citations.] The State must show that the police took reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist. [Citation.] Unless the defendant produces evidence of actual tampering, substitution or contamination, a sufficiently complete chain of custody does not require that every person in the chain testify, nor must the State exclude every possibility of tampering or contamination; the State must demonstrate, however, that reasonable measures were employed to protect the evidence from the time that it was seized and that it was unlikely that the evidence has been altered. [Citations]

'Once the State has established the probability that the evidence was not compromised, and unless the defendant shows actual evidence of tampering or substitution, deficiencies in the chain of custody go to the weight, not admissibility, of the evidence.'" *Woods*, 214 Ill. 2d at 467, 828 N.E.2d at 255, quoting *People v. Bynum*, 257 Ill. App. 3d 502, 510, 629 N.E.2d 724, 729-30 (1994).

Here, the nurse, police officer, and lab technician testified as to the protective measures they each took to ensure that the sample was not compromised. However, once the sample was delivered to Federal Express for delivery to Cellmark, the chain of custody stopped. The State failed to present a witness from Cellmark who could have testified to his or her actions with regard to the integrity or accuracy of the DNA sample and testing.

Nevertheless, the State's failure to present a complete custody chain did not prejudice defendant. The trial court emphasized on more than one occasion that the Lashley evidence was not a factor upon which it relied in sentencing defendant to the maximum. At the sentencing hearing, the court stated:

> "Let's start out by pointing out that, first of all, we are not here to punish [defendant] for what happened to Ms. Lashley. We are here for a sentence hearing in 03-CF-891 [(*sic*),] which deals with the murder of Mary Ann Wright.
>
> * * *
>
> I find that this was totally brutal, totally senseless, total depravity, total disregard to human dignity or human life. I don't see any sentence that would be appropriate for this defendant other than the maximum

> term that I can possibly give him of 60 years."

The court found that no statutory mitigating factors applied.

At the hearing on defendant's motion to reconsider sentence, the trial court stated:

> "I think when I sentenced [defendant], I pointed out at the time that I was sentencing him for killing Mary Ann Wright in the manner which he killed her, which was absolutely brutal and totally ignored any sense of human decency. I considered the testimony regarding Ms. Lashley, but the sentence was imposed for killing Mary Ann Wright.
>
> I think the testimony presented on the Lashley case was sufficient for purposes it was relevant and reliable, and I think it was properly considered, although it wasn't -- the factor I considered was, what he did in the particular case, he has -- I think I assessed his rehabilitative potential when I sentenced him to 60 years. He had several prior misdemeanor convictions, lived a marginal life, was not likely to improve his situation any; and I considered him a threat to the community, a very dangerous person. So the motion to reconsider the sentence is denied."

It is well established that "a sentencing judge has wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by the law. [Citations.] The only requirement for admission is that the evidence be reliable and relevant, as determined by the court within its sound discretion." *People v. Williams*, 181 Ill. 2d 297, 322, 692 N.E.2d 1109, 1123 (1998). The court may search anywhere within reasonable bounds for other facts that may serve to aggravate or mitigate the offense. *People v. Adkins*, 41 Ill. 2d 297, 301, 242 N.E.2d 258, 260 (1968). Criminal conduct not resulting in a conviction may even be considered. *People v. Kelley*, 44 Ill. 2d 315, 318, 255 N.E.2d 390, 392 (1970).

In addition to defendant's claim that the State had failed to establish a sufficient chain of custody of the DNA evidence, defendant also claims that Detective Beck's testimony that (1) Lashley had told him that her attacker had previously done yard work for her, and (2) Lashley's neighbor had told him that it was defendant that had done yard work for Lashley in the past was unreliable hearsay. This testimony was corroborated only with the DNA evidence. Because the DNA evidence should be excluded as unreliable, defendant argues, Beck's testimony, standing alone, was inherently unreliable and should have been excluded. Defendant claims this court should vacate defendant's sentence and remand for a new sentencing hearing. We disagree.

As stated above, the trial court, in its sound discretion, may admit any evidence during sentencing that is both relevant and reliable. "Thus, hearsay evidence, while not generally admissible at trial, may be considered by the trial court at a sentencing hearing. [Citations.] A hearsay objection goes to the weight, not the admissibility, of the evidence." *People v. Moore*, 250 Ill. App. 3d 906, 920, 620 N.E.2 d 583, 593 (1993).

Given the trial court's comments, we find the break in the chain of custody and the admission of the hearsay testimony of Detective Beck do not justify vacating defendant's sentence as both alleged errors go to the weight, not the admissibility, of the evidence. We find any error harmless and therefore affirm defendant's sentence.

C. *Pro Se* Motion Alleging Ineffective Assistance of Counsel

Prior to defendant's sentencing hearing, the trial court considered defendant's *pro se* posttrial claim of ineffective assistance of counsel. In his motion, defendant complained that his trial counsel (1) failed to challenge the State's genetic sample test results and failed to conduct an independent evaluation of the same, (2) failed to challenge the chain of custody of certain evidence, (3) disregarded defendant's requests for a continuance of the trial for the purpose of conducting additional investigation, (4) failed to hire "enough expert witnesses" to rebut the State's experts, (5) failed to elicit certain exculpatory evidence from witnesses on the stand, (6) failed to call certain exculpatory witnesses to testify at trial, and (7) failed to present an adequate defense.

Relying on *People v. Moore*, 207 Ill. 2d 68, 797 N.E.2d 631 (2003), *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), and *People v. Robinson*, 157 Ill. 2d 68, 623 N.E.2d 352 (1993), defendant argues that the trial court erred in failing to conduct an adequate inquiry into defendant's *pro se* motion and failed to appoint counsel to investigate and argue defendant's claims. We find the court conducted an adequate inquiry of defendant's claims and did not err in its decision declining to appoint counsel to investigate defendant's claims further.

In *Moore*, the Illinois Supreme Court remanded the case to the trial court with instructions to conduct an appropriate inquiry into the defendant's *pro se* posttrial motion alleging ineffective assistance of trial counsel. *Moore*, 207 Ill. 2d at 81, 797 N.E.2d at 639-40. *Moore*, who was represented by the public defender, was convicted of first-degree murder and aggravated unlawful restraint. After being sentenced to death, *Moore* filed a *pro se* motion for appointment of counsel other than the public defender. The trial court refused to consider *Moore*'s posttrial motion, dismissing *Moore*'s request as being met because it was soon to appoint appellate counsel. *Moore*, 207 Ill. 2d at 74, 797 N.E.2d at 635.

In his *pro se* motion. *Moore* had alleged that his appointed trial counsel visited him in jail only a few times, failed to file various pretrial motions or investigate the facts, and advised *Moore* that his '"first order of business was to effect the least possible sentence through plea bargaining."' *Moore*, 207 Ill. 2d at 76, 797 N.E.2d at 637. The court noted that later interpretations of its decision in *Krankel*, 102 Ill. 2d at 189, 464 N.E.2d at 1049 (the trial court should have appointed new counsel to represent defendant at the posttrial hearing in regard to his allegations that he received ineffective assistance of counsel), have led to the development of the following rule:

> "New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed. [Citations.]" *Moore*, 207 Ill. 2d at 77-78, 797 N.E.2d at 637.

"The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638. During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. "Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations." *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638. "A brief discussion between the trial court and the defendant may be sufficient." *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638. "[T]he trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638. "A trial court's finding that it is unnecessary to appoint new counsel will not be disturbed on appeal unless it is manifestly erroneous." *People v. Young*, 341 Ill. App. 3d 379, 382, 792 N.E.2d 468, 472 (2003).

Unlike the trial court in either *Moore* or *Robinson*, it appears that the trial court here had read defendant's motion and had made a preliminary inquiry into the allegations. The court noted that the motion was conclusory in nature. He then asked defendant, "What, specifically, is your complaint?" Defendant and the court engaged in a substantive dialog as to defendant's allegations. Defendant indicated that there were witnesses that his counsel did not interview or call to testify at trial. The court posed questions to defendant about his claims, asking him to name the specific witnesses counsel failed to call and identify the nature of the proposed testimony. The court listened to defendant and responded: "Go ahead with the rest of what you have to say about your lawyers. Go ahead." Although the court did not address defendant's counsel, it asked the prosecutor if he had any comment on defendant's motion. The prosecutor said he did not. The court concluded that defendant's claims did "not meet the threshold of even appointing new counsel" and that defendant had "not made anywhere near a *prima facie* case of ineffective assistance." The court found defendant's claims were either matters of trial strategy or had already been considered.

Our review of the record and of defendant's *pro se* motion indicates that the trial court in this case did allow defendant to explain why he thought his counsel was ineffective. The court gave defendant ample opportunity to set forth and support his ineffective-assistance-of-counsel claim. The court also relied on its own knowledge of defense counsel's attempts to retain his own experts to refute the State's experts. The court's reliance on its recollection was adequate in this case where defendant's allegations were refuted by the trial record. See *People v. Strickland*, 363 Ill. App. 3d 598, 607, 843 N.E.2d 897, 905 (2006) (further inquiry into the factual basis of defendant's *pro se* ineffective-assistance claims was unnecessary where the claims related to trial matters and the judge hearing the posttrial motion had presided over the trial). Contrary to defendant's assertion, the court did not fail to make an adequate inquiry into his claims, and thus, we affirm the court's denial of his motion.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's order denying defendant's motion to quash and suppress, affirm the court's evidentiary rulings and the propriety of the evidence considered at defendant's sentencing hearing, and affirm the court's order denying defendant's *pro se* posttrial motion alleging the ineffective assistance of trial counsel. As part of our judgment, we grant the State its $75 statutory assessment against defendant as costs of this appeal.

Affirmed.

APPLETON, J., with McCULLOUGH and TURNER, JJ., concurring.

Rule 23 Order Filed: 03/13/07
Oral Argument Held: 01/24/07
Justices: Honorable Thomas R. Appleton, J.
Honorable John T. McCullough, J.
CONCUR
Honorable John W. Turner, J.
CONCUR

Chief Judge ____
Other ____

Appendix D

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
201 W. MONROE STREET
P.O. BOX 19206
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CLERK OF THE COURT (217) 782-2586
RESEARCH DIRECTOR (217) 782-3528

DATE: 04/23/2007

RE: People v. Owens, Earl A.
General No.: 4-04-0087
Macon 00CF891

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue 35 days from today unless a petition for leave to appeal is filed in the Illinois Supreme Court.

DARRYL PRATSCHER,
Clerk Appellate Court
Fourth District

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Appendix E

104732

SUPREME COURT OF ILLINOIS
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September 26, 2007

Hon. Lisa Madigan
Attorney General, Criminal Appeals Div.
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Chicago, IL 60601

No. 104732 - People State of Illinois, respondent, v. Earl Owens, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.
Burke, J., took no part.
The mandate of this Court will issue to the Appellate Court on November 1, 2007.

Appendix F

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Appendix G

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

Appendix H

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
vs.
EARL OWENS
NO. 00 CF 891

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT EARL OWENS

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Dated: September 19, 2006

ORAL ARGUMENT REQUESTED

[21] I. The Trial Court Erred in Denying Defendant's Motion to Quash Arrest and Motion to Quash Search Because the Police's Pretextual Arrest of Mr. Owens Violated the Guarantees of the Illinois Constitution.

When the Decatur Police initially arrested Mr. Owens for auto theft, it had no intention of investigating him for that crime. (Supp. Rep. T. V. 1, pp. 135-36; Rep. T. V. 32, p. 18.) Instead, the Decatur Police arrested Mr. Owens in order to place him in a vulnerable position, where he would be more likely to consent to questioning and to search. (C25.) In this way, the police's initial arrest and questioning of Mr. Owens was wholly pretextual. (Id.)

Illinois' sister states have held that this type of police conduct violates the protections of their respective state constitutions. *See, e.g., State v. Sullivan*, 348 Ark. 647 (Ark. 2002); *Brown v. State*, 738 P. 2d 1092 (Wyo. 1987); *People v. Hauseman*, 900 P. 2d 74 (Colo. 1995). Although it appears that Illinois courts have not weighed in on this particular issue, the Illinois Supreme Court has established that Illinois may extend greater protection under its Constitution than what the United States Constitution may provide. *See, e.g., People v. McCauley*, 163 Ill. 2d 414, 421 (Ill. 1994) (holding that police conduct in denying an attorney access to his client did not violate the fifth amendment but did violate Article I, section 2 of the Illinois Constitution); *People v. Krueger*, 175 Ill. 2d 60, 70 (Ill. 1996) (holding that the *Krull* good-faith exception to the exclusionary rule did not comport with Article I, section 6 of the Illinois Constitution).

Illinois adheres to a limited lockstep doctrine when interpreting the relationship between its Constitution and the United States Constitution. *People v. Caballes*, 221 Ill. 2d 282, 304 (Ill. 2006). Under this doctrine, the scope of protections afforded under the Illinois Constitution often track the protections of the United States Constitution, but there have been several cases in which the Illinois courts have expanded [22] the protections of the Illinois Constitution beyond those of the United States Constitution. *See McCauley*, 163 Ill. 2d at 421; *Krueger*, 175 Ill. 2d at 70.

The Illinois Constitution provides that "[t]he people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." ILCS Const. Art. 1, § 6.

Under Article I, section 6, with few exceptions, a warrantless search is per se unreasonable. *People v. LaPoint*, 353 Ill. App. 3d 328, 332 (3rd Dist. 2004). The burden of proof rests squarely on the State to justify a search. *Id.* Further, even when a search is conducted pursuant to consent, circumstances can render that search unreasonable. *People v. Robinson*, 322 Ill. App. 3d 169, 176 (2nd Dist. 2001) (holding that despite consent, the search was unreasonable because it was predicated on "involuntary consent" where the defendant did not believe he was free to go "unless and until the search was performed.") Therefore, if a defendant is unreasonably detained, such that a reasonable person would not feel free to go unless he or she consented to a search, then that consent is involuntarily given and any evidence obtained as a result of that consent must be excluded. *See People v. Brownlee*, 186 Ill. 2d 501, 509 (Ill. 1999) (holding that consent was involuntarily given when the initial reason for the stop had "cleared" and there was nothing else that created reasonable suspicion to justify a search).

When evidence is improperly obtained through involuntary consent, the court must exclude that evidence, including all evidence which is "fruit of the poisonous [23] tree." *Robinson*, 322 Ill. App. 3d at 172; *LaPoint*, 353 Ill. App. 3d at 334; *People v. Kipfer*, 356 Ill. App. 3d 132, 143 (2nd Dist. 2005) ("fruit of the poisonous tree doctrine may be invoked to suppress evidence obtained through violation of defendant's constitutional rights.") The exclusionary rule is the proper remedy when the police have obtained evidence through involuntary consent or an unconstitutional search and seizure. *Id.*

In this case, the Decatur Police unreasonably obtained Mr. Owens' consent to search his home. Officers arrested Mr. Owens without a warrant and questioned him for several hours about an auto theft charge they knew could not be sustained. (C25.) Significantly, while Mr. Owens was being questioned, Decatur Police received exonerating evidence from Ms. Buckner herself that Mr. Owens had permission to use the vehicle. (Rep T. V. 10, pp. 44-47; Rep. T. V. 32, p. 19-20).

When the Decatur Police heard Ms. Buckner's exonerating statements, their basis for detaining Mr. Owens ended. *See Brownlee*, 186 Ill. 2d at 509. Like the defendants in *Brownlee*, *Robinson* and *LaPoint*, Mr. Owens should have been released upon receipt of that exculpatory evidence. *Brownlee*, 186 Ill. 2d at 509; *Robinson*, 322 Ill.App.3d at 176; *LaPoint*, 353 Ill. App. 3d at 332. Instead, the police's unrelenting questioning of Mr. Owens gave him, and would have given any reasonable person in Mr. Owens' shoes, the belief that he was not free to go until he consented to a search. (C27.) This conduct, in the face of exculpatory evidence, rendered Mr. Owens' eventual consent involuntary. *Brownlee*, 186 Ill. 2d at 509. Accordingly, any evidence obtained through a search which was occasioned by the involuntary consent must be excluded. *See Kipfer*, [24] 356 Ill. App. 3d at 143 ("fruit of the poisonous tree doctrine may be invoked to suppress evidence obtained through violation of defendant's constitutional rights.")

Not only was Mr. Owens' consent involuntarily given, but Mr. Owens was also the victim of a pretextual arrest. As will be explained below, the Decatur Police's pretextual arrest of Mr. Owens provides an independent basis for exclusion of the evidence found at his home.

As a threshold matter, it is important to differentiate between a "pretextual arrest" and a "pretextual stop." Although the concepts often get intermingled, they describe different police conduct with different legal consequences. The legality of a pretextual stop under federal law has been addressed by the U.S. Supreme Court in *Whren v. United States*, 517 U.S. 806 (1996). There the Court held that the reasonableness of traffic stops did not depend on the subjective intent of individual officers, but, the stop was permissible if the officers had probable cause to believe that the detained individuals had violated the traffic law. *Id.* The Court's holding reaffirmed the legality of traffic stops, pretextual or otherwise, so long as the officers had probable cause that a traffic violation had, in fact, occurred. *Id.*

Illinois, like the federal courts, nominally adheres to a pretextual arrest doctrine whereby "evidence discovered and seized by means of a search subsequent to a pretextual arrest is inadmissible. The tainted evidence is excluded in order to deter deliberate police misconduct and prevent law enforcement officers from being rewarded for their subterfuge." *People v. Alvarez*, 243 Ill. App. 3d 933, 937 (3rd Dist. 1993). However, what has been labeled as the "pretextual arrest" doctrine by the Illinois courts is in actuality the *Whren* pretextual stop doctrine. Under this doctrine, Illinois courts [25] have held that when police stop a vehicle for a traffic violation, even though the individual officer may have a subjective ulterior motivation for the traffic stop, so long as there is probable cause for the traffic infraction, the stop and any subsequent arrest and search is constitutional. *See Alvarez*, 243 Ill. App. 3d at 937.

As stated above, it is clear from the facts that although Mr. Owens was initially arrested for grand theft auto, the Decatur Police had no intention of charging Mr. Owens with auto theft. (Rep. T. V. 32, p. 18). Detectives Beck and Chabak were looking for a possible link between Mr. Owens and Ms. Wright's murder when they arrested him for auto theft. (Rep. T. Supp. V. I, p. 6, 53; Rep. T. Supp. V. 32, pp.17-19.) Indeed, shortly after Mr. Owens was arrested, police received exculpatory evidence from the owner of the vehicle herself. (Rep. T. V. 10 pp. 19-20; Rep. T. V. 32, p. 19.) The only possible purpose behind the arrest was to enable the police to get Mr. Owens in a vulnerable position where they were be able to elicit consent to search his home for evidence of a murder.[3] The two crimes were completely unrelated.

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[3] The officers further compounded their error by knowingly exploiting Mr. Owens' vulnerable state of mind. Mr. Owens felt that he had no choice but to consent to a search of his home in order to obtain his freedom. Moreover, he could not have given voluntary and knowing consent to a search for murder evidence because he was not even aware at the time he consented that he was under investigation for murder. Indeed, police did everything in their power to keep this information from Mr. Owens. By analogy, this type of knowing exploitation has held by the federal courts as violating the fourth amendment. *See, e.g., US. v. Bender*, 221 F.3d 265, 268 (1st Cir. 2000) (holding that the police can not knowingly exploit an opportunity to question a suspect by intentionally creating a situation in which the suspect would be more willing to consent to a search or questioning). This Court should similarly hold that the police's knowing exploitation of the situation they created, violates Article I, section 6 of the Illinois Constitution.

To our knowledge, no Illinois court has addressed the legality of this kind of police conduct. Although some Illinois cases have held that a *Whren*-type pretextual stop is constitutional so long as there is justification for the traffic stop, the premeditated [26] and manipulative pretextual arrest that Mr. Owens experienced has not had its legality adjudicated by the Illinois courts. Given this dearth of Illinois case law, legal authority from other jurisdictions is instructive. *People v. $111,900, U.S.C.*, No. 1-04-2624, 2006 WL 1596712, *6 (1st Dist. June 12, 2006) ('When Illinois law is silent on an issue, law from other jurisdictions is instructive.)

Arkansas, in particular, has a robust history of pretextual arrest jurisprudence. In *Smith v. State*, 265 Ark. 104, 107-08 (Ark. 1979) and *State v. Sullivan*, 348 Ark. at 647, the Arkansas Supreme Court held that when police use an arrest as subterfuge to conduct a search, the search is illegal regardless of the legality of the arrest. In both *Smith* and *Sullivan*, police officers believed that a suspect had committed a crime, however, their suspicion did to rise to the level of probable cause. In order to avail themselves of the ability to conduct a search, the police located entirely unrelated arrest warrants for minor infractions. *Smith*, 265 Ark. at 105-06; *Sullivan*, 348 Ark. at 654.

The police then used the pretext of these arrest warrants to get inside the suspect's home. Once inside, they conducted a search and discovered incriminating evidence. The State used the evidence against the suspects at trial and obtained a conviction. The Arkansas Supreme Court reversed, holding that the use of a pre-textual arrest to obtain "consent" to search a home was unreasonable and unconstitutional police conduct. Accordingly, the court held that all the evidence that was obtained through this conduct was subject to the exclusionary rule. *Smith*, 265 Ark. at 107-08; *Sullivan*, 348 Ark. at 654. *See also, State v. Brewer*, 271 Ark. 810 (Ark. 1981); *Richardson v. State*, 288 Ark. 407 (Ark. 1986).

[27] Case law from other jurisdictions confirms the soundness of Arkansas' approach to pre-textual arrests. In *Brown v. State*, 738 P. 2d at 1096, the Wyoming Supreme Court similarly held that "when the arrest is merely a subterfuge for conducting a search, the search is illegal in spite of the validity of the arrest." The Court stated that "appellant's arrest, pursuant to an outstanding warrant, was merely a pretext utilized by the sheriff's office to enable them to search appellant's home for evidence of narcotics." *Id.* at 1095. The Court cautioned that "[i]f we were to uphold the search conducted in this case on the record before us, we would open the door to the possibility of warrantless general searches of homes of every citizen ever given a traffic citation." *Id.* at 1096. Accordingly, the Court concluded that "[l]aw enforcement officers may not use the pretext of an arrest on a minor charge as a means to engage in an overbroad search to uncover evidence of an unrelated offense." *Id.* at 1096.

Colorado and California have also held that pre-textual arrest invalidate a subsequent search and seizure. *See, e.g., People v. Hauseman*, 900 P. 2d at

78 ("An arrest, even if valid, may also be a pretext to disguise otherwise impermissible law enforcement activity."); *People v. Valenzuela*, 74 Cal. App. 4th 1202, 1210 (Cal. Ct. App. 1999) (holding that pretextual arrest unsupported by probable cause is unreasonable police conduct).

Arkansas' decisions in *Smith* and *Sullivan*, as well as case law from Wyoming, Colorado and California, dictate that the Decatur Police Deparment's arrest of Mr. Owens should be unconstitutional under Article I, section 6 of the Illinois Constitution. As in *Smith*, the Decatur Police used a pretextual arrest to manipulate a way inside Mr. Owens' home to search for evidence of the murder. The *Smith* holding, [28] in particular, is a severe indictment on the police's conduct toward Mr. Owens because in *Smith*, the police at least had an arrest warrant on the "hot checks" charge. On the other hand, the Decatur police had no arrest warrant for Mr. Owens and no probable cause to suspect him of the Wright murder. *Id.* at 106. Further, the Decatur Police had exculpatory information regarding the pretextual charge which they blatantly chose to ignore.

Mr. Owens was subjected to the same improper police conduct that courts in Colorado and California and the highest courts of Arkansas and Wyoming have condemned as unconstitutional. By the morning of June 13, 2000, Detectives Beck and Chabak had orders to investigate a link between Mr. Owens and Ms. Wright's death. (Supp. Rep. T. V. 1, pp. 135-36; Rep. T. V. 32, p. 18.) They suspected a possible link between Mr. Owens and the murder, but their suspicion did not rise to the level of probably cause. Since they were unable to arrest and question Mr. Owens on the murder charge, police used the pretext of the grand theft auto charge to arrest and interrogate Mr. Owens.

This put Mr. Owens in a vulnerable position and the police eventually elicited Mr. Owens' consent to search his home. (Supp. Rep. T. V. 1, pp. 152-3; C28.) Police received exculpatory evidence on the very same day that Mr. Owens was arrested. (Rep. T. V. 10, pp. 44-47; Rep. T. V. 32, pp. 19-20.) Upon the receipt of that evidence, the police had an obligation to release Mr. Owens because they knew that the grand theft auto charge could not be sustained. Instead, the police continued to interrogate Mr. Owens. After the police had secured a Waiver of Rights, presumably for the auto theft [29] charge, Detective Beck began questioning Mr. Owens about Ms. Wrights' murder. (Supp. Rep. T. V. 1, pp. 147, 154; Rep. T. V. 11, pp. 131-2, 156.)

This is precisely the police conduct that the Arkansas and Wyoming Supreme Courts have held to be unconstitutional. The police would not have arrested Mr. Owens but for their suspicion that he was linked to Ms. Wright's death. Since that was their belief the morning of June 13, 2000, they were obligated to investigate that suspicion. The police were not permitted, however, to use the pretext of a grand theft auto charge in order to arrest and question Mr. Owens for the purpose of securing his consent for a search.

Arkansas' highest court has articulated a test for determining when these pre-textual arrests should lead to the exclusion of evidence. The court stated that evidence obtained pursuant to a pre-textual arrest should be excluded where the following applies: "[c]laims of pre-textual arrest raise a unique problem in the law – deciding whether an ulterior motive prompted an arrest which otherwise would not have occurred. Confusion can be avoided by applying a 'but for' approach, that is, would the arrest not have occurred but for the other, typically the more serious, crime. Where the police have dual motive, even though the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive been absent." *Sullivan*, 348 Ark. at 654 (Ark. 2002), *citing Hines v. State*, 289 Ark. 50, 68 (Ark. 1986). Coupled with the fruit of the poisonous tree doctrine, this test bars any evidence obtained as a result of a pretextual arrest. *Kipfer*, 356 Ill. App. 3d at 143.

To be sure, the State may cite *People v. Anderson*, 169 Ill. App. 3d 289, 290 (3rd Dist. 1988), or federal court cases to support its claim that the subjective intent

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[35] excluded due to a lack of foundation, Mr. Beck's hearsay testimony is uncorroborated. The hearsay testimony is, therefore, inherently unreliable and the court should not have considered it in sentencing Mr. Owens. *Id.*

C. This Court Should Vacate Mr. Owens' Sentence and Remand for a New Sentencing Hearing.

The trial court should not have considered evidence of the Lashley crime and this warrants the vacating of Mr. Owens' sentence. Sentencing decisions are reviewed under an abuse of discretion standard. *People v. Jones*, 142 Ill. App. 3d 51, 55-56 (4th Dist. 1986); *People v. Perruquet*, 68 Ill. 2d 149, 154 (Ill. 1977). An appellate court will overturn a trial court's sentence where, for example, a court improperly relies upon an aggravating factor in imposing a sentence. *People v. Saldivar*, 113 Ill. 2d 256, 271-72 (1986).

Here, the discussion of the Lashley crime took up the greater portion of the sentencing hearing. (Supp. Rep. T. V. 9, pp. 120-121.) Further, it is clear from the transcript of the sentencing hearing that the trial court judge considered the Lashley crime as an aggravating factor that justified the greater sentence. (*Id.*, pp. 167-168.) To the extent that there was no reliable evidence to support this evidence "of other crimes," the trial court considered improper aggravating factors in reaching its decision. This was an abuse of discretion and this matter should remanded for a new sentencing hearing.

III. Defendant is Entitled to a Remand for a Proper Inquiry and Investigation into his *Pro Se* Motion for a New Trial.

This Court may find that ineffective assistance of counsel claims that Mr. Owens raised in his post-trial motion require consideration of matters outside of the record available on direct appeal. The motion therefore puts this case in an unusual posture. On the one hand, ineffective assistance claims (like these) may be more [36] appropriately addressed in postconviction proceedings, not on direct appeal. *Webster v. Hartman*, 309 Ill. App. 3d 459, 460-61 (4th Dist. 1999); (appellate court's review of a trial court's conviction and related issues is typically limited to matters contained in the record). Some Illinois case law suggests, however, that because Mr. Owens raised these issues in his post trial motion, he might be deemed to waive them if they are not brought here — even though the court denied his motion and foreclosed pursuit of the claims. *People v. Maxwell*, 173 Ill. 2d 102, 123 (1996) (to extent issue could have been raised on direct review but was not, it is deemed waived for purposes of post conviction proceedings). Out of an abundance of caution, Mr. Owens therefore presents the issues here so as not to be deemed to have waived them. If appropriate, the Court should order that these matters can and should be dealt with in postconviction proceedings. Mr. Owens stands ready to address these issues as directed by this Court.

Mr. Owens is entitled to a remand for a proper inquiry and investigation into his *pro se* motion for a new trial because his motion established a prima facie case of ineffective assistance of counsel. The circuit court failed to undertake the requisite inquiry or permit independent investigation of his claims, leaving this Court without the evidentiary basis to consider the substance of Mr. Owens' allegations.

A. The Trial Judge Abused his Discretion by Failing to Appoint Independent Counsel to Investigate and Argue Mr. Owens' *Pro Se* Motion Alleging Ineffective Assistance and in Denying this Motion.

Where, as here, a defendant raises ineffective assistance of counsel claims and a factual inquiry would reveal trial counsel's possible neglect of the case, Illinois courts have held that new counsel should be appointed to investigate and argue a defendant's allegations. *People v. Williams*, 147 Ill. 2d 173, 251 (Ill. 1991) *citing People v. Washington*, 184 Ill. App. 3d 703, 711 (2nd Dist. 1989); *People v. Pope*, 284 Ill. App. [37] 3d 330 (4th Dist. 1996). A trial court's refusal to appoint new counsel for an ineffective assistance of counsel claim will be upheld only if the underlying claim is found to be without merit or considered a matter of trial strategy. *People v. Jackson*, 131 Ill. App. 3d 128, 139 (4th Dist. 1985). If an appellate court determines, however, that a trial court should have appointed new counsel, then it should remand a case for a full evidentiary hearing with new counsel. *People v. Moore*, 207 Ill. 2d 68, 81 (Ill. 2003); *People v. Peacock*, 359 Ill. App. 3d 326, 340-41 (4th Dist. 2005).

Here, had the trial court conducted the requisite factual inquiry into Mr. Owens' claims[5], this would have revealed trial counsel's neglect of Mr. Owens' case and warranted appointment of new counsel to investigate and argue his claims. An evaluation of the claims Mr. Owens raised in his *pro se* motion establish an apparent case of ineffective assistance of counsel.

First, trial counsel's neglect is demonstrated by counsel's lack of diligence in preparing and presenting Mr. Owens' case. A defendant receives inadequate assistance of counsel where his or her counsel's performance is marked by a lack of diligence. *People v. King*, 316 Ill. App. 3d 901 (1st Dist. 2000). Here, Mr. Owens' allegations demonstrate that his counsel was far from diligent. He alleged that counsel presented his entire defense at trial in only 20 minutes. (C526.) While the facts of each case will determine the appropriate amount of time that should be devoted to argument, fundamental fairness should dictate that 20 minutes is insufficient in a contested first-degree capital case such as the present. Devoting such little time to a defendant's argument could have been sufficient in a case in which the defendant lacked witnesses to [38] call or evidence to present. However, here, Mr.

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[5] See Section III(B) for discussion of level of inquiry that is required.

Owens identified 30 witnesses who could have provided testimony in his defense. Mr. Owens also sought to develop arguments and evidence to contest the accuracy of the prosecution's experts' DNA analyses, to demonstrate that evidence had been improperly handled and to procure additional critical evidence that was not presented. (C521-26.)

In addition, counsel continually ignored Mr. Owens' proposed defenses and tried to rush the case to trial despite not having adequately prepared the case. (C523.) Counsel did not keep Mr. Owens abreast of the developments in his case or of defense counsel's trial approach. (*Id.*) The court assigned defense counsel in the summer of 2002, but it was not until September 25, 2003, roughly only one month before the trial, that counsel notified Mr. Owens that he had no defense to argue at trial, despite the fact that Mr. Owens continued to suggest defenses and witnesses that could be called to support those defenses. (C523.) Furthermore, defendant objected to the filing of a readiness for trial certificate, but counsel obtained the certificate nonetheless. (C523.) These facts demonstrate that defense counsel did not devote the appropriate amount of time to investigate Mr. Owens' defenses and adequately prepare for trial.

Second, defense counsel neglected to call witnesses who would have provided Mr. Owens with a defense. While the decision to call witnesses typically is considered a matter of trial strategy, courts have found neglect if defense counsel failed to call particularly important witnesses. In *People v. Pitts*, 257 Ill. App. 3d 949 (4th Dist. 1994), for example, defense counsel was aware of two witnesses that could have provided exculpatory testimony. Due to defense counsel's lack of diligence, however, these witnesses did not appear at trial. At the time a post-trial hearing was conducted, [39] defense counsel had yet to contact one of the witnesses. Although defense counsel characterized his conduct as a "tactical decision," the court found that defendant had not received adequate counsel. *Id.; People v. Jameson*, 155 Ill. App. 3d 650, 661-663 (1st Dist. 1987) (remanding the case based on counsel's failure to call an important alibi witness and counsel's lack of cooperation with the defendant); *People v. Finley*, 222 Ill. App. 3d 571, 584 (1st Dist. 1992) (finding that remand was necessary because counsel's failure to contact witnesses that could have had a serious impact on a case could support a claim of ineffective assistance of counsel).

Here, counsel's failure to call certain witnesses to testify cannot be dismissed as mere trial strategy, as their testimony would have tended to exculpate Mr. Owens. For example, in his *pro se* motion, Mr. Owens indicated that Dean Paisley would have supported witness statements implicating another individual in the murder of Ms. Wright. (C522-26.) Alva Bush's testimony would have shown that evidence at the crime scene may have been mishandled and that the state had failed to account for other shoe prints at the crime scene. (C524.) Captain O'Brian would have testified that he had trampled over papers in Ms. Wright's home while wearing shoes similar to those submitted at trial as belonging to Mr. Owens. (C525.) The testimony of these witnesses would have indicated that the shoe prints attributed to Mr. Owens may have been made by someone else and that he may never have been present at the crime scene. In addition, this testimony would have implied that someone other than Mr. Owens had been present in Ms. Wright's home and committed the crime. Moreover, the fact that another unidentified bloody footprint was found on a rug in Ms. Wright's home (a fact which counsel failed to address) would have reinforced the impact of this testimony. (C526.)

[40] Third, Mr. Owens' motion stated that counsel neglected to investigate possible errors in the prosecution's DNA testing, neglected to cross-examine the prosecution's DNA expert and failed to cooperate fully with the defendant's DNA expert so that an alternate analysis could be conducted. (C522.) Illinois courts have held that counsel's approach to cross-examination can constitute ineffective assistance if objectively unreasonable. *See, e.g., People v. Rosemond*, 339 Ill. App. 3d 51, 65 (1st Dist. 2003) *citing People v. Percoraro*, 175 Ill. 2d 294, 326-27 (Ill. 1997). Further, the failure to present exculpating DNA evidence can constitute ineffective assistance of counsel. *People v. York*, 312 Ill. App. 3d 434, 436-37 (2nd Dist. 2000).

Here, DNA evidence provided the backbone of the state's case against Mr. Owens, but reasonable investigation could have shown that the company that performed the testing, Cellmark Laboratories, had a history of providing erroneous test results.

(C522) If defense counsel had challenged the findings of the state's DNA expert, this would have undermined the identification of Mr. Owens as the perpetrator. (C522.) Counsel's alleged failure to cooperate with Mr. Owens' independently hired DNA expert, Dr. Boonlayangoor, despite the doctor's assertions that the current DNA analysis could be inaccurate, demonstrates their unwillingness to pursue legitimate possible defenses. (C522.) Counsel had full access to the information needed by Dr. Boonlayangoor to conduct an accurate DNA analysis, but for unknown reasons failed to deliver the materials upon the doctor's request. (Supp. Rep. T. V. 9, pp. 13-15.) Independent testing of the DNA could have exculpated Mr. Owens.

Fourth, counsel neglected to challenge the way in which the state gathered physical evidence even though Mr. Owens provided the basis to challenge the State's [41] methods in his *pro se* motion. (Mot. for New Trial C523, 526.) Illinois courts have repeatedly held that where, as here, trial counsel disregards or fails to present exculpatory evidence, a defendant has received ineffective assistance of counsel and is entitled to a new trial. *See People v. Pitts*, 257 Ill. App. 3d 949, 952 (4th Dist. 1994), (counsel provided ineffective assistance where he failed to procure the testimony of exculpatory witnesses); *People v. Tate*, 305 Ill. App. 3d 607, 612 (1st Dist. 1990) ("counsel may be deemed ineffective for failure to present exculpatory evidence of which he is aware"). Moreover, counsel who fails to conduct a reasonable investigation ... cannot be found to have made decisions based on valid trial strategy." *People* *v. Makiel*, 358 Ill. App. 3d 102, 107 (1st Dist. 2005) (finding that counsel's failure to contact witness who would have contradicted testimony of state witnesses constituted ineffective assistance and such conduct could not be characterized as sound trial strategy).

In his *pro se* motion alleging ineffective assistance of counsel, Mr. Owens asserted that defense counsel failed to challenge Officers Michael Beck and Varnell Bond regarding the unorthodox manner in which one of the key pieces of evidence used against Mr. Owens, the purported blood-stained work boots, was gathered. (C523.) This improper removal of evidence from the crime scene could have justified its exclusion at trial or reduced the weight afforded to it by the jury. Either way, effective counsel would have addressed these issues at length on cross examination or otherwise. Instead, counsel chose to concede that the evidence was gathered in a legitimate manner by stipulating to its reliability. (Supp. Rep. T. V. 6, p. 156.)

In sum, defense counsel's failure to adequately investigate, prepare and present Mr. Owens' case raises the very strong possibility that counsel neglected Mr. [42] Owens' case. As a result, the court should have appointed new counsel to investigate Mr. Owens' ineffective assistance of counsel claims and argue them as necessary. This matter should, therefore, be remanded with the instruction that new counsel be appointed to investigate and argue Mr. Owens' meritorious allegations.

B. The Trial Court Did Not Conduct an Adequate Inquiry into Mr. Owens' *Pro Se* Claim of Ineffective Assistance of Counsel.

Mr. Owens was entitled to an adequate inquiry into his *pro se* allegations of ineffective assistance of counsel and the trial court abused its discretion by dismissing Mr. Owens' *pro se* motion in a perfunctory manner.

Illinois courts have repeatedly held that in investigating the factual basis of ineffective assistance of counsel allegations, an interchange between the court and defense counsel is necessary in all but the most meritless cases. *People v. Parsons*, 222 Ill. App. 3d 823, 829 (1st Dist. 1991) *citing People v. Jackson*, 131 Ill. App. 3d 128, 139 (4th Dist. 1985); *see also People v. Moore*, 207 Ill. 2d 68, 78 (Ill. 2003). Such an interchange permits the trial court to make an informed assessment of the validity of the defendant's claims. *Jackson*, 131 Ill. App. 3d at 140. Where a trial court has failed to conduct the requisite inquiry, an appellate court should remand a case for further post trial proceedings. *Parsons*, 222 Ill. App. 3d at 831 remanding the defendant's ineffective assistance claim); *People v. Robinson*, 157 Ill. 2d 68 (Ill. 1993) (remanding for further post trial proceedings).

As the Supreme Court of Illinois' decisions in *Moore* and *Robinson* show, an appellate court should remand an ineffective assistance of counsel claim to the trial court for failure to discuss the defendant's allegations with counsel. *Moore*, 207 Ill. 2d at 78;

Robinson, 157 Ill. 2d at 86. In Moore, the defendant, as early as pretrial discovery,

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Appendix I

NO. 104732

IN THE SUPREME COURT OF ILLINOIS

The People of the State of Illinois,

Plaintiff-Respondent,

v.

Earl Owens,

Defendant-Petitioner.

On Petition for Leave to Appeal from the Illinois
Appellate Court
Fourth Judicial District, No. 04-0087.
There heard on Appeal from the Circuit Court of
Macon County, Illinois,
No. 00 CF 891,

The Honorable James R. Coryell, Presiding.

PETITION FOR LEAVE TO APPEAL

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ORAL ARGUMENT REQUESTED

Dated: May 29, 2007

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[7] The appellate court affirmed Mr. Owens's conviction and sentence in an unpublished order (A126-151) and denied his timely petition for rehearing. (A152)

ARGUMENT

Before the appellate court, Mr. Owens raised numerous errors, all of which he contends required reversal or vacating of his conviction or sentence, and which Mr. Owens is raising before this Court and will brief in detail if he is granted leave to appeal. Mr. Owens specifically preserves for review each of the points he argued in the Appellate Court. The following points show in particular why this Court's review is needed in this case.

I. The Decisions Below Should be Reversed and this Court's Guidance Is Needed With Respect to Disposition of *Pro Se* Post-Trial Motions Alleging Ineffective Assistance of Counsel.

As Mr. Owens explained before the appellate court, to the extent his *pro se* motion for new trial referred to matters outside the record, it should be more properly addressed in post-conviction proceedings rather than direct appeal. Even if his claims were properly raised on direct appeal, the circuit court erred in failing to appoint counsel to assist Mr. Owens with his motion and conducted an insufficient inquiry into the merits of his petition. If it were appropriate to consider the merits of his ineffective assistance claims, the record to date shows counsel's performance was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). *See* App. Br. 35-48, Pet. for Reh. 1-9

This Court's guidance is needed. Illinois law could be construed as leaving an unintended ambiguity as to whether and when a defendant must raise claims of ineffective assistance of counsel—specifically claims which are based on information outside of the record on direct appeal (as most of Mr. Owens's claims were here). The [8] well-established rule in Illinois is that matters outside the record are to be brought on post-conviction proceedings, and cannot be considered on direct appeal or even in a post-trial motion. *See, e.g., People v. Yarbrough*, 93 Ill. 2d 421, 429 (1982). Some cases, however, including possible misreadings of the appellate court's decision in this case, could be interpreted as suggesting that ineffective assistance claims involving matters outside the trial record could be brought on direct appeal. There is an important need for this Court to clarify the law and preclude possible misuses of the appellate court's decision. The current lack of clarity could do a grave disservice to defendants at a time when by definition they are without the help of counsel.

The dilemma facing a defendant is illustrated by Mr. Owens's case. Immediately after trial, he promptly filed with the court a written post-trial motion, numerous paragraphs long, alleging the many and various ways—virtually all outside the record—in which his counsel had rendered ineffective assistance. Mr. Owens attached dozens of pages of exhibits which supported his claims. The circuit court dismissed his petition, however, without any investigatory or evidentiary proceedings (erroneously, as Mr. Owens argues). Mr. Owens thus never received the benefit of any assistance by counsel in organizing and arguing his numerous concerns, let alone any help in investigating the facts outside the trial record, researching, or filing any additional materials that might have helped to demonstrate that counsel's assistance fell below constitutional standards.

When Mr. Owens raises these claims on post-conviction (where they should be raised), by contrast, he will receive the assistance of counsel unless his petition is deemed "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2000) (dismissal standard); 5/122-4 (counsel appointed to assist once a petition has survived [9] dismissal). On post-conviction, Mr. Owens's allegations will be taken as true, and he will receive the assistance of counsel so long as his *pro se* allegation sets forth a "gist" of a claim, with "a limited amount of detail." *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

Mr. Owens's claims undoubtedly will clear this very low bar. But the trial and appellate courts' decisions create a possible conflict, because they imply that Mr. Owens was not entitled to any further consideration for his claims on direct review. To be clear, the appellate court may have reached the correct result in ruling against Mr. Owens on this claim if the reason for that decision was that those arguments should be reserved for post-conviction. After all, this Court's directive is clear that circuit courts may not consider matters outside the record in disposing of a motion for a new trial. *See Yarbrough*, 93 Ill. 2d at 429.

But absent clear direction from this Court, there is a risk that Mr. Owens's arguments which otherwise could be raised on post-conviction would be barred because of the rulings on his post-trial claims of ineffective assistance. *See Maxwell*, 173 Ill. 2d at 123. While no court on post-conviction *should* find that his claims are barred, the risk remains. *See Maxwell*, 173 Ill. 2d at 123. By affirming the circuit court's order denying defendant's post-trial motion on the merits (see A145-50), the appellate court might be deemed to have ruled that the claims were properly raised. Treating the claims as properly raised, however, seems clearly to run afoul of this Court's directive that circuit courts may not consider matters outside the record in disposing of a motion for a new trial. *See Yarbrough*, 93 Ill. 2d at 429. If defendant's reading of Yarbrough is correct, the appellate court should have vacated the circuit court's order denying the motion and directed the court to dismiss the claims as premature, so that defendant could raise them [10] without prejudice in post-conviction. While we doubt strongly that the trial court or this Court intended to impose such an unprecedented bar, the vagaries in Illinois decisions and the lack of guidance from the appellate courts pose concern. Under *Yarbrough*, the proper procedure was for the appellate court to hold that the circuit court should not even have addressed these issues (indeed, it should have dismissed the motion).

This Court should grant leave to appeal to clarify whether *pro se* ineffective assistance claims regarding matters outside the record can even be considered in post-trial motions or on direct appeal, and specify the correct procedures for dealing with such claims, both for Mr. Owens and for guidance of future cases.

In the alternative, Mr. Owens contends that if it is proper to raise claims of ineffective assistance which refer to matters outside the record in a *pro se* post-trial motion, and such claims are governed by the standards established in this court's decision in *People v. Moore*, 207 Ill. 2d 68 (2003), then the appellate court and trial court failed to follow those guidelines in this case. If Mr. Owens's claims were properly brought in a post-trial motion, this Court should reverse and remand and direct the circuit court to appoint counsel to assist him with the post-trial motion (if not reverse outright).

Moore requires new counsel "if the allegations show possible neglect of the case." *Moore*, 207 Ill. 2d at 78. In this inquiry, "interchange between the circuit court and trial counsel" is "usually necessary," but "a *pro se* defendant is not required to do any more than bring his or her claim to the circuit court's attention." *Moore*, 207 Ill. 2d at 78-79. Here, the trial court made *no* inquiry of trial counsel, but merely cross-examined Mr. Owens regarding the petition (A110-122). The appellate court found this sufficient, which clearly runs counter to *Moore*. Mr. Owens protests the inequity in discarding his [11] claims simply because a *pro se* defendant did not provide a sufficiently compelling extemporaneous justification, while standing alone before the trial judge who had presided over his conviction, the prosecutor who had secured that conviction, and defense counsel whose ineffectiveness had allowed the conviction to happen.

If this Court grants leave to appeal, this Court should rule in Mr. Owens's favor and provide direction for the future disposition of claims such as those he has raised, which at present fall into the cracks between the rules barring courts from considering matters outside the record and the rules requiring litigants to raise all claims or risk waiver. In all events, if the Court were to reach the merits of his ineffective assistance claims, the record to date confirms their merit.

II. The Appellate Court's Pretextual Arrest Analysis Misunderstands the Doctrine And Is at Odds With this Court's Decision in *People v. Evans*.

The trial court erred in denying Mr. Owens's motion to quash arrest and suppress evidence because his arrest was unconstitutional under the federal and Illinois constitutions because it lacked probable cause and, even if there somehow were probable cause, was pretextual. *See* App. Br. 21-30, Pet. for Reh. 9-14. The appellate court's decision likewise proceeded from a misunderstanding of the doctrine of pretextual arrest, and resulted in the court erroneously affirming a trial and conviction of Mr. Owens in violation of his rights under both the Illinois and United States Constitutions.

The record establishes that Decatur police arrested Mr. Owens for the theft of his girlfriend Michelle Buckner's car only in order to interrogate him about the murder of Ms. Wright, the crime with which he was ultimately charged. This, as Mr. Owens has repeatedly argued, was an impermissible pretextual arrest. The appellate court upheld the denial of Mr. Owens's motion to quash arrest and suppress evidence because it concluded [12] (a) there was probable cause to support the initial arrest for theft, and (b) once in custody, Mr. Owens voluntarily answered police questions regarding the theft and the murder. (A138) This analysis is inconsistent with the facts and the law.

First, there was no probable cause to arrest Mr. Owens for the vehicle theft. As an initial matter, Ms. Buckner called the police station during Mr. Owens's interrogation to inform or remind the police that Mr. Owens had her permission to use her vehicle (and thus could not be guilty of its theft). (Rep. T. V. 10, pp. 44-47; Rep. T. V. 32, p. 19-20) Further, regardless of whether there existed probable cause to arrest Mr. Owens for the theft before Ms. Buckner's call—and there was not—probable cause vanished after the call, and Mr. Owens's continued detention and interrogation from this point forward were clearly unlawful. *See People v. Brownlee*, 186 Ill. 2d 501 (1999). The illegality of the detention vitiates any consent Mr. Owens may have given while detained. *Id.* at 521.

Moreover, even prior to the Buckner telephone call, there was never probable cause to arrest Mr. Owens for the auto theft. Of the several alternate definitions of "theft" in Section 16-1 of the Criminal Code, the only one which could possibly have applied to Mr. Owens's conduct was section 16-1(a)(1), which provides that "A person commits theft when he *knowingly* *** Obtains or exerts *unauthorized* control over property of the owner." 720 ILCS 5/16-1(a)(1) (West 2000) (emphasis added). Every officer who spoke with Ms. Buckner prior to Mr. Owens's arrest acknowledged that Ms. Buckner either said that Mr. Owens had permission to drive the vehicle or at least that she had told Mr. Owens he had permission to drive the vehicle. By definition, possession with the owner's permission is not theft, nor is possession with an unknown lack of permission. Thus there was *never* probable cause to arrest Mr. Owens for the theft.

[13] More fundamentally, even if there were probable cause to arrest Mr. Owens for theft, that would not constitute a sufficient basis for rejecting an argument of *pretextual* arrest, as the appellate court found in affirming the circuit court's denial of Mr. Owens's motion to suppress. To argue that an arrest is pretextual is to argue that *regardless* of whether there existed probable cause to arrest him for the crime for which he was taken into custody, the police were using that criminal violation as an excuse to engage in custodial interrogation of the

defendant for a different crime. "By definition, a pretextual arrest occurs when the police employ an arrest based on probable cause as a device to investigate or search for evidence of an unrelated offense for which probable cause is lacking" *United States v. Trigg*, 878 F.2d 1037, 1039 (7th Cir. 1989); *accord*, *People v. Perez*, 258 Ill. App. 3d 465, 470 (1994).

Although this Court does not appear to have directly confronted the issue, this Court's opinion in *People v. Evans*, 125 Ill. 2d 50 (1988), strongly suggests that Illinois recognizes the pretextual arrest doctrine. There, the defendant argued that his arrest for aggravated assault was a pretext for questioning him about a murder. This Court rejected that argument, but did not reject the doctrine of pretextual arrest in doing so. Rather, this Court affirmed on the grounds that "defendant's arrest was legal *rather than pretextual*." *Evans*, 125 Ill. 2d at 72 (emphasis added). Thus, the Court implicitly acknowledged that arrests *could* be pretextual, and as such would be illegal, but simply found no pretext in that case. In contrast, the facts of the case at bar clearly establish pretext, and the circuit court should have granted defendant's motion to quash arrest and suppress evidence.

The facts of this case are readily distinguishable from those in *Evans*. The Court there noted several aspects of the case which supported the conclusion that the [14] aggravated assault arrest was non-pretextual. For example, the court noted facts which indicated the State's active interest in the aggravated assault—the arresting officer sought out the complaining witness, took a statement which unambiguously accused the defendant of the crime, then promptly arrested the defendant. Moreover, and of clear significance to the court's conclusion that defendant's arrest was not pretextual, the defendant was only asked a single isolated question about the unrelated crime in the first ten hours of his detention (arrested at 12:50 p.m., only one question about the murder before 11 p.m.). Further interrogation about the murder ensued only after three other victims had identified the defendant in a lineup. *Evans*, 125 Ill. 2d at 70-72.

The case at bar differs in each of these critical respects. First, the Decatur Police Department's disinterest in the car theft was manifest. When Detective Hubbard first spoke to Ms. Buckner, the complaining witness, he "tried to talk her out of making a report," so that could "get on to more important things"— "the business of who killed Mrs. Wright." Moreover, Detective Beck denied Mr. Owens's request during the post-arrest interrogation to call Ms. Buckner to confirm his permission to use the car. These facts are drawn from the testimony of the police officers themselves.

In further distinction from *Evans*, it was entirely unclear that Mr. Owens had committed the crime for which he was arrested. Every officer with whom Ms. Buckner spoke admitted that she told them that Mr. Owens had permission to drive the car, and possession with the owner's permission is not theft. 720 ILCS 5/11-1(a)(1) (West 2000).

Finally, in stark contrast to *Evans*, the police were plainly interested in pursuing Mr. Owens for the murder at the time of his arrest. His arrest occurred only after Detectives Beck and Chabak were told to investigate his involvement in the murder. [15] Although Detective Chabak claimed that Ms. Buckner wanted Mr. Owens arrested for the theft (Supp. Rec. Vol. 1, p. 65), he admitted that he "may have had him [Mr. Owens] arrested anyway." Supp. Rec. Vol. 1, p. 117. To what end, other than a pre-existing suspicion of Mr. Owens for the murder? The motives of the police were clearly revealed by the fact that once Mr. Owens was in custody, interrogation regarding the murder began almost immediately. Within approximately an hour and a half of the arrest, Detective Beck had not only questioned Mr. Owens extensively about the murder—perhaps for more than an hour of that time—but had gone so far as to elicit Mr Owens's consent to search his home, a search which Detective Beck admitted related only to the murder. Further, as previously noted, Detective Beck refused to allow Mr. Owens a simple telephone call which would have clarified his permission to use the vehicle. Moreover, a third Detective, Detective Patton, went to speak with Ms. Buckner around the time of Mr. Owens's arrest (Supp. Rec. Vol. 1, pp. 65, 103) but asked her questions only about the murder, not about the theft. (Supp. Rec. Vol. 1, p. 124)

The instant case is factually distinguishable from *Evans* on the issue of whether the arrest was pretextual. It bears a much greater resemblance to the decisions from sister states which have quashed arrests and suppressed evidence based on the doctrine. See, *e.g.*, *State v. Sullivan*, 348 Ark. 647 (Ark. 2002); *Brown v. State*, 728 P.2d 1092 (Wyo. 1987); *People v. Hauseman*, 900 P. 2d 74 (Colo. 2000). Mr. Owens respectfully requests that this Court grant leave to appeal to clarify that probable cause to arrest on the pretext crime is not the end of the pretextual arrest inquiry. Given the pretextual nature of the arrest in this case, the proper result is to quash Mr. Owens's arrest and suppress all evidence resulting therefrom, including all evidence obtained as a result of Mr. Owens's [16] supposed consent, which was given during his unlawful detention after the pretextual arrest and tainted thereby (see *Brownlee*, 186 Ill. 2d at 521). The circuit court erred in denying Mr. Owens's motion to quash and suppress, and if this Court grants leave to appeal, Mr. Owens will present a thorough demonstration of why this Court should overturn that ruling.

III. This Court Should Review This Case To Clarify Chain of Custody Analysis And Confirm that Mr. Owens is Entitled to a New Sentencing Hearing Due to the Court's Consideration of Inadmissible and Prejudicial Evidence.

The trial court abused its discretion in considering DNA evidence (which lacked a sufficient foundation) and uncorroborated hearsay evidence of other crimes at his sentencing hearing. *See* App. Br. 30-35, Pet. for Reh. 14-17.

This Court should clarify and correct the appellate court's mis-analysis and mis-application of his arguments challenging his sentencing hearing. As Mr. Owens demonstrated, his sentencing hearing was rendered fundamentally unfair due to the circuit court's consideration of inadmissible evidence—DNA evidence admitted based on a legally insufficient chain of custody and hearsay evidence corroborated only by the DNA evidence—purporting to link Mr. Owens to an extremely prejudicial prior crime. Errors below concerning Mr. Owens's arguments on chain of custody illustrate precisely why this Court's intervention is needed.

Before the appellate court Mr. Owens argued that the DNA evidence should not have been admitted because of the utter lack of chain of custody evidence after Cellmark took custody of the Lashley sample. The appellate court erroneously concluded that any gaps in the State's chain of custody went to the weight of the evidence and not its admissibility (A141), based on a mis-application of this Court's decision in *People v.*

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Appendix J

IN THE CIRCUIT COURT FOR THE SIXTH
JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

THE PEOPLE OF THE)
STATE OF ILLINOIS,)
Plaintiff)
)
Vs.) Case No. 20000-CF-891
)
Earl Owens,)
Defendant)

AFFIDAVIT

Now comes the Defendant (pro se) in the aforementioned case, and states that the statements in the Motion For New Trial are true and accurate.

/S/
Earl Owens
Defendant

This document was subscribed and sworn before me on 1-14, 2004

My commission expires on November 7, 2006

/S/

Official Seal
Fonda Robbins
Notary Public, State of Illinois
My Commission Expires 11-7-2006

IN THE CIRCUIT COURT FOR THE SIXTH
JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

THE PEOPLE OF THE)
STATE OF ILLINOIS,)
Plaintiff)
)
Vs.) Case No. 20000-CF-891
)
Earl Owens,)
Defendant)

PRO SE MOTION FOR NEW TRIAL

Now COMES, the Defendant Earl Owens (pro se) and in moving this Honorable Court to vacate his conviction, grant a new trial and appoint counsel to investigate his claim that trial counsel rendered constitutionally ineffective assistance, he states as follows:

1. The Defendant was not granted a fair trial because his Trial Counsel rendered ineffective assistance. *Strickland v. Washington* 466 U.S. 668 104 S. Ct. 2052 80 L. Ed. 2d 674, 1984: *People*

v. Albanese 104 Ill. 2d 1246. The Defendant seeks appointment of counsel to investigate his claims of ineffective assistance pursuant to the Illinois Supreme Court's decision in *People v. Moore*, No. 87958 (May 22, 2003). Had Trial Counsel properly investigated the case, the jury would have acquitted Mr. Owens. Mr. Owens did not kill Mary Ann Wright. An innocent man stands convicted of Ms. Wright's murder.

2. The Defendant asks that this Honorable Court to refrain from making a ruling at this time as to the ultimate question whether Trial Counsel rendered ineffective assistance. The Defendant requests appointment of Counsel to investigate Defendant's claims of ineffectiveness because the Defendant's claims are not spurious per *Moore* and because an innocent person stands convicted of a crime he did not commit.

3. During trial, the State presented evidence from the Illinois State Police Springfield Forensic Science Laboratory purporting to show that Mr. Owens' DNA matched the evidence sample. Trial Counsel failed to adequately investigate whether the testing was erroneously performed. (Noting Exhibit A from Genetic Technologies) Mr. Owens knows the testing was improperly done because he did not kill Ms. Wright. Accurate and reliable testing would have excluded Mr. Owens as the killer.

4. Defense Counsel failed to investigate Cellmark's history of providing erroneous DNA testing results. Had Defense Counsel conducted such a reasonable investigation, they would have presented such evidence to the jury, which would have led to the jury questioning the validity of the DNA testing, thereby raising reasonable doubt of Mr. Owens' guilt. Defense Counsel also failed to effectively cross-examine the State's witnesses thereby precluding the jury to consider Cellmark's dubious history of having caused the wrongful conviction of innocent persons. (Exhibit A)

5. Upon learning of the State's testing data, Mr. Owens and family representatives sought to secure testing and analysis by an independent laboratory. Mr. Owens and family representatives asked Defense Counsel on numerous occasions for all the raw data used for DNA testing including but not limited to the documents and materials required to be disclosed by State under Rule 417. Family representatives needed all these documents and materials in order to secure an analysis and evaluation of the date by an independent Laboratory. Defense Counsel had disclosed incomplete laboratory results to family members, but refused to release the complete file. (Exhibit B)

6. On November 5, 2003, the Laboratory Director at Independent Forensics, P.W. Boonlayangoor

P.H.D. wrote a letter to Mrs. Vevalyn Joyner, the defendants mother, informing her that he did not have sufficient information to make an independent evaluation and analysis of the data. Dr. Boonlayanger claimed that testing results from the Illinois State Police Crime Laboratory "could be deceptive and/or misleading". (Exhibit C)

7. At present, independent DNA testing cannot be performed because Trial Counsel has failed to cooperate with Defense Counsel's reasonable requests. In light of Dr. Boonlayangoor's assertion that the DNA could have been misleading and/or deceptive, Counsel should be appointed to investigate Mr. Owens claims of ineffective assistance and be provided the resources to ensure that properly conducted DNA testing is performed. (Exhibit C)

8. The Defendant's violation of rights appear when a straw was retrieved by a Decatur Police Detective on June 13, 2000 on a food trip to McDonald's in Decatur, Illinois and a used condom was retrieved without warrant from Defendant's residence between June 13-15, 2000. This Physical evidence recovered from this Defendant shows that the State failed to comply with Discovery disclosure requirements in so far as they failed to account for this evidence and provide for a chain of custody to determine the whereabouts of this evidence and what was done with it. (Exhibit D)

9. Trial Counsel never challenged the State on how additional physical evidence was retrieved. Under cross-examination of Michael Beck and Varnell Bond, no questions were as to why physical evidence was taken out unsecured as evidenced by WAND TV video June 13, 2000. Boots and a pillowcase containing additional evidence from the Defendant were removed unsecured as well as items from the Victim's residence. (Exhibit E)

10. Defendant further asserts that canine units were dispatched to go to the address (2265 Powers Blvd.) and the Defendants address (645 S. 23rd Street) and were unable to establish any scent association of the Defendant, or the Victim outdoors between the two residences. No scent of Defendant was found in Victim's residence. Trial Counsel did not follow up on these issues. (Exhibit F)

11. Defendant asserts that legal counsel for 2000-CF-891 was appointed in the Summer of 2002. The 416(h) certificate (Readiness for Trial) was filed over the objections of Defendant. Appointed counsel notified Defendant on or near September 25, 2003 that they had no defense. Defendant's family was notified as well by e-mail. The trial began on October 31, 2003. (Exhibit G)

12. Defendant asserts that he voiced his objection on trial readiness during the 416 (h) hearing to Trial Counsel and they went ahead and certified 416

(h) document anyway. Defendant believes the Trial Judge was in error as well under Supreme Court Rule 416 (h) for not allowing Defendant to voice his objections about not being ready for trial, and not having adequate access to counsel, which is allowed by this rule. (Exhibit H)

13. Defendant asserts there were not enough expert witnesses hired in order to dispute prosecution witnesses. Defendant asserts that Trial Counsel did not provide any expert witness testimony throughout the trial, with the exception of one expert from Genetic Technologies, which was also used by the Prosecution. (refer to 416 (h) certificate)

14. Defendant asserts that the initial trial list consisted of the following witnesses, and their testimony:

Justin Dial — walked dog at 5:30am in the area of the victim's residence and noticed nothing unusual

1 Golfer — saw nothing unusual around 8th fairway of Nelson Park Gold Course at 8:00am or 9:00am

Glen and Jo Wilson — saw black male walk through neighborhood just before time of killing who was definitely not the Defendant — gave three consistent statements. During the trial, in the absence of the jury, their statements changed. No Defense questions were raised to impeach their testimony. Mr. Wilson informed Trial Counsel that the Prosecutors (Jack Ahola, Jay Scott and Mr. Schultz) visited them two weeks prior to trial.

▪ Rainey and Elnora Brewer — saw same black male as the Wilsons and he was not the Defendant

Police Officer Jason Walker — recovered K-Y Jelly and K-Y lid from bed. There were no prints from the Defendant. Also never recovered was a murder weapon and admittedly there were no witnesses.

▪ Alva Bush, Crime Scene Specialist for the Defense — evidence was moved in crime scene

Detective Randy Chaney — recovered prints. Took carpet samples from Defendant's home and none of victim's blood was ever found in Defendant's home. No murder weapon was recovered. There were no witnesses.

Detective Frank Hubbard— recovered number of prints from victim's residence and none matched the Defendant's

Roger Ryan — Illinois State Police Crime Lab — compared prints recovered Detective Hubbard and Detective Chaney to Defendant's known prints and found no matches. Two were matched to the victim's.

James Kreiser — Illinois State Police Crime Lab — second shoe print on comforter — did not match the Defendant's.

Eric Maryland Illinois State Police Crime Lab — none of Defendant's prints on coke can or Battles & James bottle.

Jennifer Lu - Forensic Specialist — DNA sample recovered from victim's left hand fingernail scrapings. It was not Defendant's. In addition, no blood was found on any of Defendant's clothes.

Travis Hindman — Pathologist

Melody LeVault - Lab Technician — no hairs of Defendant's found on anything recovered from victim or near victim at time of killing

- Sabou Owens and Annette Ingram — both looked at shoes and observed no blood, and shoes looked different than those in photo.

- Michelle Buckner — did not identify shoes in photo as being Defendant's (and they are not) and, in fact, was shown a different photo of shoes in living room. In addition, observed Defendant to have on blue and white shirt, blue jeans and Nike shoes at 7:00am on June 13, 2000.

- Decatur Fire Department Captain Kevin O'Brian — discovered victim dead in her room and he trampled over numerous papers with similar shoes.

Detective Mike Beck — Took Defendant's statement and checked him on June 13, 2000 and observed no bruises and cuts.

- Diane Wright and Debbie Myers — saw K-Y jelly in victim's cabinet.

Vincent Joyner — did not give the shoes to Defendant on which blood was found.

- Investigator of the Illinois Appellate Defenders Office Dean Paisley — witness was present to discuss limited interviews with some of the witnesses that was never called to verify statements that would support the Defense

- Lisa Owens - minor — saw another black male go into Mary Ann Wrights residence several days before the murder

- Susan Wilmert and Cheryl Scott — saw the vagrant stalker black male in the neighborhood that definitely was not the Defendant's.

- Lee Card — saw a black make in the neighborhood asking for money that definitely was not the Defendant.

▪Vevalyn Joyner — On October 27, 2003, subpoenaed by the State, was asked to look at photographs of shoes allegedly taken out of Defendant's home. Her testimony was the shoes she picked up out of the his living room and placed in his bedroom on June 14, 2000 were not the shoes in the photograph shown to her by the States Attorneys and State Investigator. She was told she would not be called by the State, but she would most likely be called by the Defense. But she never was.

▪Indicates witnesses not allowed to testify that could have bolstered the Defense's case

15. Defendant further asserts that during the trial, the Prosecution did not address two pieces of alleged evidence, and Defense counsel did not follow up to find out why the rug was not produced that showed a shoeprint and why the bedspread was not shown with a shoeprint for the jury.

16. Defendant asserts that the court records will show the trial presentation for the Defense lasted approximately 20 minutes. This was the entire period that Defense counsel used to defend the Defendant on a murder case.

Defendant prays that the Honorable Court will grant this motion.

/S/ ______________

Earl Owens
Defendant

A Copy of this document was subscribed and sworn before me on

/S/________________

My commission expires on November 7, 2006.

/S/________________

Official Seal
Fonda Robbins
Notary Public, State of Illinois
My Commission Expires 11-7-2006